

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 127

D. H. OVERMYER Co., INC., OF OHIO

and

D. H. OVERMYER Co., INC., OF KENTUCKY, *Petitioners,*

v.

FRICK COMPANY, A PENNSYLVANIA CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS,
LUCAS COUNTY, OHIO

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**APPENDIX FOR PETITION FOR CERTIORARI IN
THE UNITED STATES SUPREME COURT**

D. H. Overmyer Co. Inc. v. The Frick Company

Pertinent Docket Entries

C. P. Appearance Docket No. 408

Cause No. 204697

Pg. No.'s 197 A-4 A-12

Attorneys:

**Shumaker, Loop & Kendrick—FRICK COMPANY, a corporation,
Plaintiff-Appellee**

**Bugbee & Conkle—D. H. OVERMYER CO., INC., a corporation,
Defendants-Appellants**

1968

**July 12—Petition, Warrant of Attorney Military Affidavit,
Answer and praecipe filed.**

**July 12—Judgment as stated above and for costs. Jour.
392-78.**

**July 16—Notice of Judgment on Cognovit note mailed to
D. H. Overmyer Co. Inc. 201 East 42nd Street, New
York, New York, 10017. Certified Number 059724.
Return receipt requested. Postage 50¢**

**July 16—Notice of Judgment on Cognovit note mailed to
D. H. Overmyer Co. Inc., a Kentucky Corp. 201 East
42nd Street, New York, New York 10017. Certified
059723. Return Receipt Requested. Postage 50¢**

**July 16—Notice of Judgment on Cognovit note mailed to
D. H. Overmyer Co. Inc., c/o C.T. Corporation Sys-**

tem, 1036 Union Building, Cleveland, Ohio 44115. Certified # 059725. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Co. Inc., c/o C.T. Corporation System, 1700 Kentucky Home Life Bldg., Louisville, Kentucky 40202. Certified # 059726. Return Receipt Requested. Postage 50¢

July 16—Notice of Judgment on Cognovit note mailed to D. H. Overmyer Inc., 302 South Byrne Road, Toledo, Ohio 43615. Certified # 059727. Return receipt requested. Postage 50¢

July 22—Motion of defendants for New Trial, filed.

July 22—Motion of defendants to Stay Execution, filed.

July 22—Affidavit, filed.

August 6—Motion of defendant to Vacate Judgment Rendered on Warrant of Attorney, filed.

August 6—Answer of defendants and Cross petition of defendant D. H. Overmyer Co. an Ohio Corporation, filed.

Nov. 16—Motions to Stay Execution is overruled, for a new trial overruled. Demurrer of defendants to plaintiff's cause of action overruled. Jour. 401-154.

Dec. 4—Notice of Appeal and Praeipce filed. CA 6552

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

FRICK COMPANY, a corporation, 231 West Main Street,
Waynesboro, Pennsylvania 17268, *Plaintiff*,

v.

D. H. OVERMYER Co., Inc., a corporation, 302 South Byrne
Road, Toledo, Ohio 43615,

and

D. H. OVERMYER Co., Inc., a corporation, 1700 Kentucky
Home Life Building, Louisville, Kentucky 40202,
Defendants.

Petition

1. Plaintiff is a Pennsylvania corporation qualified in accordance with the provisions of Ohio Revised Code Chapter 1703 to do business in Ohio.

2. D. H. Overmyer Co., Inc., Toledo, is an Ohio corporation which resides in and does business in Lucas County, Ohio. To the best of plaintiff's knowledge and to the best of its attorneys' knowledge, the last known Lucas County address of said defendant was and is 302 South Byrne Road, Toledo, Ohio 43615. Said defendant's statutory agent is C. T. Corporation System, 1036 Union Commerce Building, Cleveland, Ohio 44115.

3. D. H. Overmyer Co., Inc., Louisville, is a Kentucky corporation. To the best of plaintiff's knowledge and to the best of its attorney's knowledge, the last known address of said defendant's principal office was and is 201 East 42 Street, New York, New York 10017. Said defendant's statutory agent is C. T. Corporation System, Kentucky Home Life Building, Louisville, Kentucky 40202.

4. On June 1, 1967, defendants, acting through duly authorized officers, executed and delivered to plaintiff a

promissory note containing a warrant of attorney (hereafter the said promissory note is called the "Note") pursuant to which the defendants jointly and severally promised to pay to the order of plaintiff in twenty-one (21) equal monthly installments the principal sum of One Hundred Thirty Thousand Nine Hundred Seventy-seven Dollars (\$130,977.00) plus interest thereon at the rate of 6% per year on an add-on basis, said interest to commence on June 1, 1967. A true copy of the Note is attached hereto, is designated Exhibit A, and is made a part of this Petition.

5. On May 1, 1968, defendants failed to pay to plaintiff the monthly installment payments required by the Note, and said failure to pay the monthly installment payments required by the Note has continued to this date.

6. By reason of defendants' failure as described in the immediately preceding paragraph, plaintiff, acting in accordance with the terms of the Note, hereby elects to and does hereby declare the entire remaining unpaid principal of the Note, namely, Sixty-two Thousand Three Hundred Seventy Dollars (\$62,370.00), together with all interest thereon, immediately due and payable, presentment, demand, notice and protest having been duly waived by the defendants.

WHEREFORE, plaintiff prays for judgment against the defendants for the sum of Sixty-two Thousand Three Hundred Seventy Dollars (\$62,370.00) with interest thereon at the rate set forth in the Note from the 1st day of May, 1968, until the Note is paid in full, and for costs of suit.

SHUMAKER, LOOP & KENDRICK

By /s/ ROBERT A. JEFFERIES, JR.
Robert A. Jefferies, Jr.

Attorneys for Plaintiff

Suite 500—811 Madison Avenue
Toledo, Ohio 43624
Phone 241-4201

STATE OF OHIO }
COUNTY OF LUCAS } ss:

Robert A. Jefferies, Jr., being duly sworn, says that he is the duly authorized attorney for said plaintiff, that the foregoing petition is founded upon an instrument in writing for the payment of money; that said instrument in writing is in his possession; and that he verily believes the statements contained in the foregoing instrument are true.

ROBERT A. JEFFERIES, JR.
Robert A. Jefferies, Jr.

Sworn to before me by said Robert A. Jefferies, Jr., and by him subscribed in my presence this 12th day of July, 1968.

JOYCE A. KWIATKOWSKI
Notary Public

Joyce A. Kwiatkowski
Notary Public, Lucas County,
Ohio

My Commission Expires 11-14-71

Exhibit A**INSTALLMENT NOTE**

Amount: \$130,977.00

New York, New York

June 1, 1967

For value received, the undersigned, jointly and severally, promise to pay to the order of Frick Company, a Pennsylvania corporation, at its office in Waynesboro, Pennsylvania, 17268, the sum of One hundred thirty-thousand nine hundred seventy-seven dollars (\$130,977.00) in twenty-one (21) equal monthly installments of six thousand eight hundred and ninety-one dollars and eighty-five cents (\$6,891.85) which installments include interest at the rate of six (6) per cent per annum on an add-on basis commencing June 1, 1967.

The first installment shall be payable June 1, 1967, and the remaining installments on the same date of each successive month thereafter, until this Note has been paid in full.

The Makers or any of them may, at their option, make prepayments on the principal amount of this Note without penalty; together with interest accrued to the date thereof. Prepayments shall be applied to the installments of principal due on this Note in the order of maturity.

The undersigned hereby waive presentment, demand, notice and protest of this Note.

The entire unpaid balance of this Note shall become due and payable at the option of the Payee, without demand or notice, on the appointment of a receiver of the undersigned or of its properties, if such receivership is not discharged within fifteen (15) days; or on the filing of a petition by or against the undersigned, under the Bankruptcy Act of the United States, if such petition is not discharged within fifteen (15) days; or on the default in the payment of any installment of principal or interest, if said default con-

tinues for fifteen (15) days; or on the general assignment for the benefit of creditors, if said assignment is not discharged within fifteen (15) days.

The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for a period of fifteen (15) days.

Payee agrees to remove any Mechanic's Lien or liens filed by the Payee against any property of the undersigned including three Affidavits of Lien which were filed on behalf of Frick Company in respect to its claim of \$194,031.00 and which were recorded by the Recorder of Lucas County, Ohio as follows:

No. 501285, Volume of Lien Records 46, Page 468,

No. 501831, Volume of Lien Records 46, Page 520, and

No. 502867, Volume of Lien Records 36, Page 542.

D. H. OVERMYER Co., INC.
(a Kentucky corporation)

D. H. OVERMYER
D. H. Overmyer

By **D. H. OVERMYER**
Chairman & Chief Executive
Officer

D. H. OVERMYER Co., INC.
(an Ohio corporation)

SHIRLEY C. OVERMYER
Shirley C. Overmyer

By **D. H. OVERMYER**
Chairman & Chief Executive
Officer

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

**Appearance of Attorney for Defendants and Confession
of Judgment**

By virtue of the warrant of attorney contained in a certain promissory note annexed to this Answer and the petition filed herein by plaintiff, I, an attorney at law in the several courts of record of this State, do hereby enter an appearance for the above-named defendants who executed said promissory note and said warrant of attorney and who waive the issuing and service of process therein, and I do hereby confess a judgment in favor of said plaintiff, against said defendants, on said promissory note for the sum of Sixty-Two Thousand Three Hundred Seventy Dollars (\$62,370.00), being the amount appearing due for the principal of said promissory note, plus interest thereon at the rate set forth in said promissory note from May 1, 1968, and also for costs of suit, taxed and to be taxed:

J. RONALL BOWMAN

Attorney for Defendants

402 Lof Bldg.

Toledo, Ohio

Phone No. 243-5227

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 6552

Judgment Entry

This day came Frick Company, plaintiff, by its attorney, Robert A. Jefferies, Jr.; also appeared in open court, for and on behalf of D. H. Overmyer Co., Inc., an Ohio corporation, one defendant herein, and D. H. Overmyer Co., Inc., a Kentucky corporation, the other defend-

ant herein, J. Ronald Bowman, an attorney at law of this court, and by virtue of a warrant of attorney annexed to the promissory note attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in this action, and confessed a judgment on said promissory note against said defendants and in favor of said plaintiff for Sixty-Two Thousand Three Hundred Seventy Dollars (\$62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note, and for costs of suit taxed and to be taxed.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

(1) Plaintiff recover from D. H. Overmyer Co., Inc., an Ohio corporation, one of the defendants herein, the following sum (hereafter said sum is called the "Judgment Sum"):

Sixty-two Thousand Three Hundred Seventy Dollars (\$62,370.00) plus interest thereon from May 1, 1968 at the rate set forth in the Note (6% add-on interest computed over a 21-month period on a base sum of \$130,977.00 or the equivalent of the said 6% add-on interest) together with costs herein expended, taxed and to be taxed; or

(2) Plaintiff recover from D. H. Overmyer Co., Inc., a Kentucky corporation, one of the defendants herein, an amount equal to the Judgment Sum or

(3) Plaintiff recover from each of the defendants such sums which, when totaled, will equal but not exceed the Judgment Sum.

/s/ NICHOLAS J. WALINSKI
Judge

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Notice of Judgment on Cognovit Note

Case No. 204697

• • • • •
To D. H. Overmyer Co., Inc., Defendant:

This is to inform you that a Judgment in the amount of \$62,370 plus interest at the rate decreed in the Judgment Entry has been entered against you on a Cognovit Note in the above-captioned case in the Common Pleas Court of Lucas County, Ohio, on July 12, 1968. This notice is sent to you in compliance with Sec. 2323.13 (c) of the Ohio Revised Code.

LUCAS COUNTY COMMON PLEAS COURT

ROBERT KOPF, CLERK OF COURT

By /s/ BEULAH R. LONG
Deputy Clerk

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion for New Trial

Now come the defendants and move the court to vacate the judgment rendered on July 12, 1968, and for a new trial for the following causes which materially affect the substantial rights of defendants, to-wit:

1. Irregularity in the proceedings of the prevailing party and of the court by which defendants were prevented from having a fair trial.
2. The judgment is not sustained by sufficient evidence and is contrary to law.
3. Newly discovered evidence, material for the defendants, which with reasonable diligence they could not have discovered and produced at the trial.

And for other errors manifest from the face of the record.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

CERTIFICATE OF SERVICE

(Omitted)

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Affidavit

Joseph W. Westmeyer, Jr., being duly sworn, says that he is the attorney for the applicants for a new trial herein on the grounds of newly discovered evidence.

Affiant says that the judgment herein was entered by virtue of a warrant of attorney without notice to these defendants; that the consideration for the note upon which judgment was entered was the contract price agreed to be paid for the installation of a refrigeration system in a warehouse building located at 3630 South Street, Toledo, Ohio; that defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that warranties given by plaintiff in connection with the contract for the installation of said equipment were breached; and that because defendants had no notice of the entry of the court's judgment herein they could not with reasonable diligence have produced such material evidence prior to the court's entry of judgment:

JOSEPH W. WESTMEYER, JR.
Joseph W. Westmeyer, Jr.

Sworn to before me and subscribed in my presence this
22nd day of July, 1968.

ALLAN J. CONKLE
Notary Public
Lucas County, Ohio

Allan J. Conkle, Notary Public
State of Ohio—Attorney-at-Law
Unexpiring Commission
O. R. C. Sec. 14703

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Motion To Vacate Judgment Rendered on Warrant of Attorney

Defendants respectfully move the court to vacate and set aside the judgment entered against them herein on the 12th day of July, 1968 during the present term of court, said judgment having been entered by virtue of a warrant of attorney without notice to these defendants.

Defendants say that they have a good defense to this action and the note on which judgment was rendered, as shown by their answer submitted herewith, which they request leave to file herein.

/s/ BUGBEE & CONKLE
Attorneys for Defendants

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Answer of Defendants and Cross Petition of Defendant

D. H. Overmyer Co., Inc., an Ohio Corporation

1. For answer to plaintiff's petition, defendants deny each, all and singular the allegations of said petition not hereinafter admitted to be true.

2. Defendant, D. H. Overmyer Co., Inc., an Ohio corporation, hereinafter called "Overmyer", on or prior to February 11, 1966, employed Nixon Construction Co., Inc., as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

3. On or about the 11th day of February, 1966, Nixon Construction Co., Inc., and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby

plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars (\$223,000.00) to furnish machinery, equipment, labor, materials and supervision, and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part hereof. Thereafter, Overmyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

4. Defendants say that the promissory note referred to in plaintiff's petition was executed as and for a part of the purchase price of Two Hundred Twenty-three Thousand Dollars (\$223,000.00) for a complete automatic refrigeration system furnished and installed by plaintiff pursuant to the contract in the cold storage warehouse being constructed for and proposed to be operated by Overmyer.

5. The said refrigeration system was not furnished and installed in accordance with the contract of purchase, in that plaintiff supplied materials, equipment and machinery of poor quality and design and negligently installed the same in an unworkmanlike manner, and Overmyer was required to, and did, engage other contractors to repair defects therein which resulted from the negligent work, design and defective materials.

6. The said refrigeration system was to have been a completely autonomous and automatic refrigeration system, but because plaintiff failed to comply with the contract, and because the said system was negligently installed by plaintiff, the system did not operate automatically. Overmyer was required to, and did, employ personnel to tend, maintain and control the system at all times.

7. The contract provided that said refrigeration system was to have been completed and ready for final acceptance on August 15, 1966, whereas plaintiff did not actually com-

plete the installation until March 17, 1967. Overmyer sustained lost profits because it was not able to operate the cold storage warehouse during the seven month period between the date provided for completion of the warehouse in the contract and the actual date of completion.

8. The refrigeration system installed by plaintiff was guaranteed and warranted by it to be free from defects in material and workmanship and to hold a temperature of minus 10° F. to within the limits of standard temperature controls, but, as installed, the said system was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

9. Because of the facts set forth in paragraphs numbered 5 through 8 above, Overmyer's expenses and losses exceeded the balance which plaintiff claims to be due on the note, and there was a failure of consideration for said note.

CROSS PETITION

First Cause of Action

10. For its cross petition against plaintiff, Overmyer incorporates all of the allegations of the foregoing answer as fully as though repeated herein.

11. Overmyer says that prior to February 11, 1966, it employed Nixon Construction Co., Inc. as a general contractor to construct a cold storage warehouse on Overmyer's real estate located at 3630 South Street, Toledo, Ohio.

12. On or about the 11th day of February, 1966, Nixon Construction Co., Inc. and plaintiff entered into a written agreement, hereinafter referred to as "contract", whereby plaintiff was engaged for a price of Two Hundred Twenty-three Thousand Dollars (\$223,000.00) to furnish machinery, equipment, labor, materials and supervision,

and to perform all work necessary for the construction of a complete automatic refrigeration system to be installed in the said cold storage warehouse. A copy of the contract, marked Exhibit "A", is annexed hereto and made a part hereof. Thereafter, Overmyer, pursuant to paragraph numbered 15 of the contract, assumed all of the rights and privileges and became subject to all the duties and obligations of Nixon Construction Co., Inc. thereunder.

13. Overmyer has duly performed all the conditions of the contract on its part.

14. Plaintiff breached the contract in that it performed its services in an incompetent, negligent and unworkman-like manner, and in that it supplied materials, equipment and machinery of such poor design and quality that the refrigeration system furnished by plaintiff would not operate as represented by plaintiff and Overmyer was required and compelled to engage, and did, in fact, engage, other contractors to repair the defects existing in the refrigeration system; which defects existed solely because of the negligent work, design, and defective materials, equipment and machinery supplied by plaintiff.

15. By reason of the facts set forth in the first cause of action Overmyer has been damaged in the sum of Twenty-six Thousand Eight Hundred Dollars (\$26,800.00).

Second Cause of Action

16. For its second cause of action, Overmyer incorporates each, all and singular the allegations contained in its first cause of action and further says that the machinery, equipment and materials designed, fabricated and supplied by plaintiff were to have constituted a completely autonomous and automatic refrigeration system.

17. Because of plaintiff's incompetent, negligent and unsatisfactory design and workmanship, and because plaintiff designed, fabricated and/or supplied machinery, equipment and materials unsuitable and inadequate to meet the

demands of the system, and because of plaintiff's breach of the contract, as aforesaid, the automatic refrigeration system, or integral and essential parts thereof, repeatedly broke down and became inoperative and failed to operate automatically and Overmyer was compelled and required to, and did, in fact, hire, engage and employ additional qualified personnel to tend, maintain and control the system at all times.

18. By reason of the facts set forth in the second cause of action Overmyer has been damaged in the sum of Nine Thousand Dollars (\$9,000.00).

Third Cause of Action

19. For its third cause of action, Overmyer incorporates each, all and singular the allegations contained in its first and second causes of action and further says that in and by the contract, it was provided that the said refrigeration system was to be ready for demonstration and final acceptance on or about August 15, 1966, and the completion of the said work on or before that date was expressly made a condition of the said contract, and a part of the consideration for which plaintiff was paid the price set forth therein.

20. Plaintiff entered upon the performance of the work under said contract, but wholly and totally failed and neglected to complete the said work in the time specified in the contract for the completion thereof.

21. By reason of plaintiff's failure to complete the said work within the time specified in the contract, Overmyer was unable to have the construction of the cold storage warehouse completed, to take possession thereof, and to have the same occupied as a public cold storage warehouse, and Overmyer lost the use of such completed warehouse for approximately seven (7) months.

22. By reason of the facts set forth in the third cause of action, Overmyer has been damaged in the sum of Fifty Thousand Five Hundred Dollars (\$50,500.00).

Fourth Cause of Action

23. For its fourth cause of action, Overmyer incorporates each, all and singular the allegations contained in its first, second and third causes of action and further says that, among other things, plaintiff guaranteed and warranted that, for a period as set forth in said contract, the machinery and equipment manufactured by it and supplied by it would be free from defects in material and workmanship, and that the machinery specified therein would hold a temperature of minus 10° F. to within the limits of standard temperature controls.

24. The said refrigeration system installed by plaintiff was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

25. Within the period set forth in the contract, and upon ascertaining that the said equipment was defective and inadequate, Overmyer demanded of plaintiff that it make such repairs and changes in the refrigeration system as were required to comply with the provisions of the said agreement and warranty, and plaintiff wholly failed, neglected and refused to take such remedial steps, as required, and still so fails, neglects and refuses.

26. Upon the failure, neglect and refusal of plaintiff to complete the aforesaid contract and warranty, Overmyer was compelled to, and did, cause the said refrigeration system to be put in a proper condition so that it would comply with the aforesaid contract and warranty.

27. Prior to ascertaining that the said refrigeration system did not comply with the provisions of the said contract and warranty, and while Overmyer was ignorant of such facts, it paid to plaintiff the sum of Two Hundred Twenty-three Thousand and Six Dollars (\$223,006.00), the total amount which it was required to pay to plaintiff under the aforesaid contract, in the form of cash and installment note.

28. By reason of the foregoing facts, Overmyer has been damaged in the sum of Eighty-six Thousand Three Hundred Dollars (\$86,300.00).

WHEREFORE, defendants pray that plaintiff's cause of action be dismissed, and that judgment be rendered for defendant, Overmyer, against plaintiff in the sum of Eighty-six Thousand Three Hundred Dollars (\$86,300.00), plus interest and for their costs herein expended.

BUGBEE & CONKLE

By /s/ ALLAN J. CONKLE
Allan J. Conkle

Attorneys for Defendants
2001 Toledo Trust Building
Toledo, Ohio 43604
Phone: 244-6788

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

G. R. Silcox says he is Vice-President for D. H. Overmyer Co., Inc., an Ohio corporation, and for D. H. Overmyer Co., Inc., a Kentucky corporation, and is duly authorized in the premises, and that the statements and averments contained in the foregoing answer and cross petition are true as he verily believes.

G. R. SILCOX

Sworn to before me and subscribed in my presence, this 31st day of July 1968.

GERALD N. GOLDBERG
Notary Public

Gerald N. Goldberg
Notary Public, State of New York
No. 31-6558320
Qualified in New York County
Commission Expires March 30, 1970

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

No. 204697

Journal Entry

.....

This day this cause came on to be heard on the motions of the defendants to Stay Execution, for a New Trial and to Vacate Judgment and a demurrer to the petition and the same were submitted on the record, supporting memoranda, affidavits, exhibits and arguments of counsel.

Upon consideration thereof, and being fully advised in the premises the court finds that the Motion to Stay Execution, the Motion for a New Trial and the Motion to Vacate are not well taken. The court further finds that the demurrer is not well taken.

It is therefore, ORDERED, ADJUDGED and DECREED that the defendants' Motion to Stay Execution is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion for a New Trial is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' Motion to Vacate Judgment is overruled.

It is further ORDERED, ADJUDGED and DECREED that the defendants' demurrer to the petition be overruled.

It is further ORDERED, ADJUDGED and DECREED that the Motion and Affidavit for examination of the debtors in aid of execution filed in this court on July 17, 1968, be in full force and effect and that any duly authorized officers of said corporations appear before this court at 10 AM on the 16th day of December, 1968 in courtroom # 3 and answer concerning all their assets including those items listed in the Motion and Affidavit filed in this court on July 17, 1968.

To so much of this order as is adverse to the interests of the defendants they object and except.

JOHN J. CONNORS, J.
Common Pleas Judge

Approved:

SHUMAKER, LOOP and KENDRICK
Shumaker, Loop and Kendrick
Attorneys for Plaintiff

BUGBEE and CONKLE
Bugbee and Conkle
Attorneys for Defendants

Approved as to Form Only

Court of Appeals: Assignment of Error, No. 2

"It is a denial of Appellants' rights to due process under the State and Federal Constitutions to be denied an opportunity to present a defense to a judgment on a cognovit note when such judgment is taken without notice and where a valid defense is asserted in an answer tendered with a motion to vacate the judgment filed within term."

IN THE COURT OF APPEALS, LUCAS COUNTY, OHIO

CA No. 6552

Journal Entry

• • • • •
This cause came on to be heard on appeal on questions of law from the judgment of the Common Pleas Court, Lucas County, Ohio; and the same was submitted to this Court on the original papers, the record, the Bill of Excep-

tions, the Affidavits and Exhibits presented in the Common Pleas Court and arguments of counsel.

The Court, being fully advised in the premises, finds that the trial Court, with no abuse of discretion, properly overruled the defendants-appellants motion to vacate the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Common Pleas Court of Lucas County, Ohio, is affirmed at costs of the defendant-appellants; and the cause is remanded to that Court for execution of judgment.

To all of which defendants-appellants except.

CLIFORD F. BROWN

*Judge of the Court of Appeals,
Presiding*

HARVEY G. STRAUB

Judge

JOHN W. POTTER

Judge

Filed

Court of Appeals

Sep. 22, 1969

Approved:

BUGBEE & CONKLE

Bugbee & Conkle

Attorneys for Defendants-Appellants

SHUMAKER, LOOP & KENDRICK

JAMES M. TUSCHMAN

Attorneys for Plaintiff-Appellee

Ohio Supreme Court, Transcript of Record, p. iii

Proposition of Law No. 5:

It is a violation of the right of trial by jury provided by

Section 5, Article I, of the Ohio Constitution and of the right to due process of law provided by the Fourteenth Amendment to the United States Constitution for a trial court to deny a jury trial to the maker of a note who tenders a validly stated defense against the original holder thereof who has taken a judgment on a warrant of attorney when the trial court refuses to take evidence on the merits of the defense before deciding whether to vacate the judgment.

Authorities cited in support of Proposition of Law No. 5:

Fourteenth Amendment to the United States Constitution

• • • • •
Sniadach v. Family Finance Corporation of Bay View,
395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820, 37 Law
week 4520 (1969)

The Supreme Court of the State of Ohio

1969 Term, To Wit: December 17, 1969 No. 69-720

**JOURNAL 49, Page 677 APPEAL FROM THE COURT OF APPEALS
FOR LUCAS COUNTY**

This cause, here on appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its cost herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

Ohio Revised Code

Section 2323.13 Warrant of attorney to confess.

"(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker, or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition." (As amended, effective 12-1-67)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1970

No. 137

D. H. OVERMYER Co., INC., OF OHIO

and

D. H. OVERMYER Co., INC., OF KENTUCKY,
Petitioners,

v.

FRICK COMPANY, *Respondent.***Respondent's Designation of the Record To Be Included
in the Appendix**

To: Russell Morton Brown, Esquire
508 Federal Bar Building
Washington, D. C. 20006

Pursuant to Supreme Court Rule 36(2), respondent hereby designates the following portions of the record to be included in the Appendix:

(1) The following additional pertinent docket entries of the Common Pleas Court of Lucas County, Ohio to be added to the petitioners' designation:

1968

July 22. Motions for new trial and to stay execution set for hearing on August 5, 1968 at 1:30 p.m. before Judge Connors. Jour. 392-201*

August 6. Memorandum in Opposition to Defendants' Motion to Stay Execution and Motion for a New Trial filed.

August 15. Affidavit of Paul C. Guth filed.

* Hearings held on August 15, 1970 and September 5, 1970.

August 15. Affidavit in Opposition to Motion to Stay Execution and for a New Trial filed.

August 15. Affidavit in Opposition to Motion to Stay Execution filed.

August 21. Supplemental Memorandum in Opposition to Defendants' Motion to Stay Execution, Motion for New Trial and Motion to Vacate Judgment filed.

August 22. Defendants' Memorandum in Support to Vacate Judgment filed.

August 22. Demurrer of Defendants to Plaintiff's Cause of Action filed.

November 27. See Execution Doc. 23, page 347, EX No. 23847.

December 3. Motion for Stay of Execution and to Fix Supersedeas Bond filed.

December 3. Bond filed.

1969

March 3. Oral motion for Nunc Pro Tunc entry. Jour. 409-265.

(2) Excerpt from transcript from hearings in the Common Pleas Court of Lucas County, Ohio of August 15, 1968 and September 5, 1968. (See Item I attached).

(3) Defendants' Motion to Stay Execution filed in the Common Pleas Court of Lucas County, Ohio. (See Item II attached).

(4) Affidavit of Howard F. Burpee and exhibits. (See Item III attached).

(5) Affidavit of Paul C. Guth and exhibit. (See Item IV attached).

(6) Affidavit of Paul C. Guth and exhibits. (See Item V attached).

(7) Index from Defendants' (Overmyer) Memorandum in Support of Motion to Vacate filed in the Common Pleas Court of Lucas County, Ohio. (See Item VI attached).

(8) Excerpt of Journal Entry filed in the Common Pleas Court of Lucas County, Ohio on March 3, 1969. (See Item VII attached).

(9) Defendants-Appellants' (Overmyer) Motion for Reconsideration filed in the Court of Appeals of Lucas County, Ohio. (See Item VIII attached).

(10) Defendants-Appellants' (Overmyer) Motion to Certify the Case to the Supreme Court of Ohio filed in the Court of Appeals of Lucas County, Ohio. (See Item IX attached).

(11) Defendant-Appellants' (Overmyer) Application for Conclusions of Fact filed in the Court of Appeals for Lucas County, Ohio. (See Item X attached).

(12) Journal Entry filed in the Court of Appeals of Lucas County, Ohio denying defendants-appellants' (Overmyer) Motion to Certify, Application for Conclusions of Fact and Motion for Reconsideration. (See Item XI attached).

(13) Mandate from the Supreme Court of Ohio to the Common Pleas Court. (See Item XII attached).

SHUMAKER, LOOP & KENDRICK

ROBERT B. GOSLINE

Robert B. Gosline

JAMES M. TUSCHMAN

James M. Tuschman

811 Madison Avenue, Suite 500

Toledo, Ohio 43624

241-4201

Attorneys for Respondent.

April 16, 1971

**Excerpts From Transcript From Hearings in Common Pleas
Court of Lucas County, Ohio, of August 15, 1968 and Sep-
tember 5, 1968**

ITEM I

DEFENDANTS' BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the hearing of the above-entitled cause, in the Court of Common Pleas of Lucas County, Ohio, in the April, 1968 Term of said Court, on Thursday, August 15, 1968, before the Honorable John J. Connors, Jr., one of the Judges of said Court, the following proceedings were had, to-wit:

• • • • •

(13) Mr. Tuschman: Your Honor, as to the motion for temporary injunction, I have the opinion rendered by the United States District Judge, and he has stated here, Judge Walter Mansfield, the United States (14) District Judge in New York rendering his opinion on the motion for temporary injunction, his conclusion of law:

"Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, extensive documentary evidence furnished by defendant indicates that the plaintiffs' action lacks merit. No basis for equitable relief in the form of a stay or injunction is indicated. Plaintiffs' suit is limited to an action of damages, and there is no showing that it would suffer any irreparable injury as a result of defendant's enforcement of the security. The effect of granting relief would be to prevent the institution of court proceedings in Florida and Kentucky in violation of the policy enunciated in Title 28, U.S.C. Section 2283,"

and they state at the bottom,

"This shall constitute the Court's finding of fact and conclusions of law, Judge Mansfield."

I have a certified copy of the Judge's opinion in that case, Your Honor.

• • • • •

(25) Mr. Wolfe: . . .

I would submit if Mr. Tuschman would like to argue now about the pleading of a valid defense, a valid legal defense, we have not set up only counterclaims. We have asserted counterclaims but we have also set up a valid legal defense on that note and that lies in failure of consideration.

(32) Mr. Wolfe: Yes. We have an affidavit here, but our affidavit, quite frankly, does not go to the pleading aspect of the case. It goes to the merits of the case.

The Court: Well, I think in all fairness what you should do is be given the opportunity to look at what Jim has just filed today—

Mr. Tuschman: I will furnish him with copies, Your Honor.

The Court: —and if you want time to file a brief and memorandum in opposition to this, you are entitled to do that.

If you want oral argument on that, all right. If you want to submit it, I will make my decision on what you filed.

(35) The Court: How much time will you need to get in whatever you have to get in in opposition to what Jim has just filed today?

Mr. Wolfe: We will do what is reasonable with the Court.

(36) Mr. Tuschman: Can we state a date then?

The Court: I want to give him a reasonable time to file whatever he wants to.

Mr. Tuschman: A week?

Mr. Wolfe: A week will be fine.

The Court: You have whatever you want filed by a week from today.

.

(38) Thursday, September 5, 1968. Court Room No. 3, Lucas County Court House, Toledo, Ohio, 2:15 o'clock P.M.

The Court: Cause No. 204697, Frick Company versus D. H. Overmyer Company, Inc., et al. You make whatever

argument you want at this time, for the record, and I will take the case under advisement and give you my decision. So who wants to proceed.

.

(67) Mr. Garrigan: I beg the Court's pardon, I didn't mean to object so strenuously. I, myself, have filed fifteen suits on behalf of Overmyer in New York. But Overmyer in three years built 180 warehouses in thirty states. There aren't hundreds of contracts, there are tens of thousands of contracts with many contractors.

ITEM II

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Motion To Stay Execution

.

Defendants respectfully move the court to stay execution of and any procedure to enforce the judgment entered herein on the 12th day of July, 1968 pending the filing of a Motion for a New Trial and/or a Motion to Vacate said Judgment, and the disposition thereof.

/s/ BUGBEE & CONKLE

Attorneys for Defendants

ITEM III

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Affidavit of Howard F. Burpee

(Filed: August 15, 1968)

• • • • •

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

Howard F. Burpee, being duly sworn, deposes and says that:

(1) I am an engineer in the New York office of Frick Company, plaintiff herein, and I am submitting this affidavit in opposition to the motion of defendants herein to stay execution and the related motion for a new trial in the above action. I am informed and believe that judgment in favor of plaintiff was made and entered by and in this Court on July 12, 1968.

(2) The contract dated February 11, 1966 (referred to in the affidavit of Joseph W. Westmeyer, Jr., Esq.) between plaintiff Frick Company (hereinafter "Frick") for the construction of a refrigeration system in defendant Overmeyer's warehouse located at 3630 South Street, Toledo, Ohio was negotiated by me. Subsequent to negotiations and the execution of said contract, I was in general charge of this matter for the New York office. By reason of my participation in the negotiations and subsequent responsibility for this job, I am fully familiar with the facts hereinafter set forth. Copy of such contract is annexed hereto as Exhibit I. Such contract and the documents incorporated therein will hereinafter sometimes be referred to as the "Contract".

(3) I am informed and believe that Mr. Westmeyer's affidavit which is the basis for the instant motions in effect concedes that the note upon which the judgment was entered

herein was given in payment "for the installation of a refrigeration system in a warehouse building located at 3630 South Street, Toledo, Ohio; . . .". I am informed and believe that Mr. Westmeyer then states in his affidavit that at the new trial "defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that the warranties given by plaintiff in connection with the contract for the installation of said equipment were breached; . . ."

(4) As will appear from the facts hereafter set forth in this affidavit and the exhibits thereto, these motions are totally devoid of merit and an obvious last ditch effort to impede and hinder the plaintiff from collecting the price payable under the Contract which in accordance with its original terms should have been paid in full more than a year and eight months ago. In addition, any stay of execution herein will deprive Frick of the security (i) upon which Frick insisted as a condition for completing the installation after defendant had defaulted in making the payments required under the Contract during the construction period; and (ii) on the basis of which Frick twice extended the date for complete payment of the full price provided for originally by the Contract.

A. The Background of this Action.

(5) Frick is engaged in the business of manufacturing and installing refrigeration equipment. By the Contract, Frick agreed with Nixon Construction Company (hereinafter "Nixon") to install the refrigeration equipment of the Toledo warehouse of D. H. Overmyer Co., Inc. (hereinafter "Overmyer"). Due to Nixon's unstable financial condition, defendant required that Nixon's obligation under the Contract be guaranteed by Overmyer.

(6) Although the relationship between Nixon and Overmyer was ostensibly that of general contractor and owner,

I am informed and believe that Nixon was in fact a wholly owned subsidiary of Overmyer. As a matter of fact the general contractor's work was not carried out by Nixon, but by a corporation known as Green & White Construction Company, Inc. ("Green"). Nixon was a subsidiary of Green and in January 1967, Overmyer purchased the stock of Green and as a result, Nixon was absorbed into Overmyer. The necessity for this action was apparently the result of Nixon's inability to meet its obligations, and annexed hereto as Exhibit 1 is letter dated January 16, 1967 from Overmyer informing Frick and other suppliers of its acquisition of Green in order that Green (and Nixon) "would be able to fully satisfy its obligations to you * * *."

(7) Frick encountered considerable difficulties on this job. The building was behind schedule with the result that Frick was delayed in making its installation. In addition, and of great importance to Frick, was the fact that Nixon failed to make the progress payments required under the Contract. This resulted in repeated requests for moneys owed and a series of unkept promises that Frick would be paid. As a result, on September 30, 1966 Frick telegraphed Overmyer pointing out that although invoices for progress payments through August 31, 1966 "in the amounts of \$148,471 have been submitted, payment of only \$28,969 has been received." A copy of the aforesaid telegram is annexed hereto as Exhibit 2 and annexed hereto as Exhibit 3 is letter dated October 3, 1966 together with the invoices referred to therein, which represents a statement of Frick's account as of September 30, 1966.

(8) Green attempted to further delay payment of the amounts payable to Frick as of September 30, 1966 which had been guaranteed by Overmyer. This was done by a claim that the invoice should have been sent to Green's Toledo office and not to Green's New York office as was required by the Contract and as had been done by Frick without objections in the case of earlier invoices. A copy

of the mimeographed notice from Green is annexed hereto as Exhibit 4. Frick complied with such request, as appears from its letter dated October 7, 1966, copy of which is annexed hereto as Exhibit 5, but pointed out the inappropriateness of the procedure followed by Green. When no payments of the amounts payable by September 30, 1966 were received by October 10, 1966, Frick stopped the work on the project and gave notice thereof to Green by letter dated October 10, 1966 which is attached hereto and made a part hereof as Exhibit 6. It is to be noted that parts of the amounts payable on September 30, 1966 had been payable at dates prior to September 30, 1966.

(9) As a result of such failure to make payments in accordance with the Contract, Frick filed mechanics liens on November 3, 1966 covering the Overmyer warehouse property which liens were filed on November 3, 1966 in a total amount of \$194,031.

(10) Subsequent to the filing of these liens, Overmyer requested Frick to go forward with the work and Frick agreed to do this on the basis of Overmyer's agreement to pay Frick 10% of the amount owed (\$19,403.10) with the balance represented by a promissory note payable in 12 equal monthly installments of \$15,498.23. Such Note was to be executed by The Overmyer Company, Inc., a New York corporation, which I believe to be in control of, controlled by, or under common control with Overmyer. That arrangement was confirmed by letter dated January 24, 1967 from Frick to Overmyer, a copy of which is annexed hereto as Exhibit 7. Overmyer delivered the Note so executed to Frick in a letter dated February 16, 1967 wherein it was requested that Frick begin "work immediately * * *." A copy of the aforesaid Note is annexed hereto as Exhibit 8 and letter of February 16, 1967 is annexed hereto as Exhibit 9.

B. The Completion of the Job by Frick on March 17, 1967 and its Acceptance by Overmyer which under the Contract Preclude any Claim for the Alleged Poor Design or Quality of the Refrigeration System

(11) On March 17, 1967 Frick had performed all of its work under the Contract and sent to Nixon a "notice of completion". Attached to this notice is an acceptance executed by Overmyer's general manager in Toledo, on behalf of Marion Willis, Overmyer's Vice President of refrigeration, which states:

"Gentlemen:

This is to inform you that your Erector, Mr. Ira C. Coleman has completed in a satisfactory manner all work of supervision and or erection and demonstration specified in contract with you dated 2/11/66, and that the said work as well as the machinery and apparatus specified in said contract, is hereby accepted as per the contract conditions.

Yours truly,"

A copy of this notice of completion and acceptance is annexed hereto as Exhibit 10.

(12) The Contract provides in article 20 of the "Conditions of Sale" that after the machinery and equipment have been installed, then Frick shall notify the Buyer (Nixon) that the machinery and equipment "are ready for demonstration". Article 20 then provides that after demonstration, if the machinery and equipment performs according to the contract "and the guarantees if any therein" then

"... Buyer is to give the Seller an unconditional written acceptance which acceptance shall constitute a waiver by the Buyer of all claims other than those which may arise from Seller's warranty in Articles 1 and 2 of this Agreement." (Italics supplied)

(13) As appears from the foregoing, acceptance of the machinery and equipment constitutes a waiver by Overmyer of all claims against Frick except such claims as are covered by the warranties contained in articles 1 and 2 of the Contract.

(14) Article 1 of the Contract warrants machinery and equipment manufactured by Frick to be free from defects in materials and workmanship. Frick assumes the obligation to repair or replace any defective material manufactured by Frick f.o.b. its plant after such defective machinery or equipment had been so returned to its plant. Frick Company's warranty with respect to machinery or equipment not manufactured by it is limited to the liability of its own suppliers.

(15) Article 2 of the contract specifically provides as follows:

"The Seller shall not be liable for any losses, damages, or delays caused by any defect, except to furnish duplicate parts in accordance with the above warranty. Buyer agrees that Seller shall not be liable for any damages to Buyer or to a third person arising out of the presence of the installed machinery and equipment on Buyer's premises, or out of the use or operation thereof. In no event shall Seller be held liable to Buyer for consequential damages.

None of the warranties by the Seller contained herein shall be enforceable against the Seller if the Buyer shall default in making settlement of the purchase price hereunder or any of the payments required to be made by the Buyer to the Seller hereunder."

(16) The foregoing demonstrates that under the Contract, Frick has no liability on account of the alleged "poor design and quality of the system", the ground on which a new trial is sought. Frick's sole obligation is to furnish

to the buyer "duplicate parts in accordance with the above warranties." Under no circumstances can Frick be held liable at this time for the alleged failure to meet the specifications of the Contract.

(17) It is to be noted that Mr. Westmeyer's affidavit (the basis for the instant motions) does not make any claim that Frick refused to repair or replace any deficient materials in accordance with its obligations under the Contract.

There could be no basis for any such claim. This is demonstrated by a letter by Overmyer dated March 6, 1968, copy of which is annexed hereto as Exhibit 11. As appears from such letter, as of such date and eleven days prior to the expiration of the warranty period (March 17, 1968) Overmyer claimed the sum of \$7,556.72 for repairing equipment installed by Frick. Such letter does not specify the equipment on account of which the claim is made and does not state that such expenses were incurred after Frick's refusal to repair or replace the equipment. The claim therein made is refuted by Frick's answer dated March 8, 1968, copy of which is annexed hereto as Exhibit 12. I am informed and believe that Overmyer never denied Frick's contention that the amounts so claimed by Overmyer probably represent expenditures incurred in rewinding the electric motors installed by Frick. Such rewinding was necessitated by Overmyer's insistence that such motors be wired for 440 volts, despite the fact that the current actually supplied would be 480 volts. The fact that such an installation would create difficulties was repeatedly called to the attention of Overmyer who, nevertheless, insisted on 440 volt motors. Attached hereto as Exhibit 12a is copy of a letter by me to Overmyer containing my last warning on this subject matter. Certainly the existence of a \$7,556.72 claim (even if undisputed which it is not) should not affect the collection of a \$62,370 judgment.

(18) The claims of poor design, poor quality and failure to meet specifications are the sheerest after-thought. This

is demonstrated by the arrangement which was finally entered into between Frick and Overmyer—an arrangement which the defendant is now attempting to repudiate.

C. After the Installation had been Completed and Accepted on March 17, 1967, Overmyer Approached Frick and Asked that it Release the Mechanics Liens Previously Referred to.

(19) After acceptance of the installation (Paragraph (11)) discussions were held between Frick and Overmyer which resulted in the following agreement:

(a) Execution by Overmyer of the installment note in the amount of \$130,977 and dated June 1, 1967 on which judgment was rendered herein on July 12, 1968. This Note required complete payment of the outstanding amounts due to Frick in 21 monthly installments ending March 1969—two full years after the completion by Frick of the job. As a result of this arrangement, Overmyer's monthly payments to Frick were reduced from \$15,498.23 to \$6,891.85 and the rate of interest on the indebtedness was reduced from 6½% to 6%;

(b) The release by Frick of its lien on the Toledo warehouse;

(c) The securing of Overmyer's liabilities by second mortgages on real estate located in Hillsboro County, Florida and Jefferson County, Kentucky.

(20) The foregoing arrangement was confirmed by letter from Overmyer's general counsel dated June 23, 1967, copy annexed hereto as Exhibit 13.

(21) It was not until October 2, 1967 that the executed original of the installment note dated June 1, 1967 was sent to Frick together with (a) check for the installments of the Note then due; and (b) letter from Overmyer's

general counsel confirming instructions to Overmyer's local attorneys in Tampa and Louisville to record the second mortgages "previously agreed upon." A copy of this letter is annexed hereto as Exhibit 14.

(22) As appears from the foregoing, Overmyer, which was unable to meet its obligations to Frick, succeeded in negotiating a very generous extension of time in which to pay off its indebtedness to Frick and in addition, and of obvious importance to Overmyer, it obtained from Frick a release of the lien on the Toledo warehouse. Your deponent is informed and verily believes that Frick, in accordance with its agreement with Overmyer, filed a release of its mechanics liens on November 3, 1967.

**D. Defendant's Sole Motive for the Instant
Motions is to Further Delay Collection
of Frick's Just Claim.**

(23) The transparent nature of these motions is demonstrated by the fact that none of the claims asserted in Mr. Westerineyer's affidavit were made at the time Overmyer executed the second mortgages and the installment note on which judgment was rendered herein, six months after the installation of the equipment and commencement of its operation. No claim was made by Overmyer at that time that Frick's installation was done in a negligent manner or was "of a poor design and quality . . .". As appears from Exhibit 14 (letter from Overmyer dated October 2, 1967) Overmyer's sole concern was that it obtain an extension of time to pay an admitted indebtedness and, of great importance to it, to get from Frick a release of its liens.

(24) As appears from Exhibit 11, Overmyer's claim against Frick eleven days prior to the expiration of the warranty period aggregated \$7,556.72. I am informed by Frick and believe that Overmyer was in default of its

obligations under the Note on which judgment was rendered herein on June 1, 1968. Accordingly, under the terms of such Note, Frick could have commenced this action and entered judgment therein not later than June 16, 1968. Thereafter, I am informed and believe, on June 14, 1968 Overmyer instituted an action against Frick in the United States District Court of New York for an aggregate recovery of \$132,100 for damages sustained by Overmyer on account of the installation of the refrigeration system substantially for the reasons set forth in Mr. Westmeyer's affidavit herein. Thus, Overmyer claims in effect that its damages between March 7, 1967 (more than eleven months after completion of the installation) and the end of the warranty period increased by an amount in excess of \$125,000. I am informed and believe that in connection with such action, Overmyer obtained a stay in the United States District Court for the Southern District of New York which prevented Frick from enforcing its Note by the action herein until July 5, 1968 when such stay was vacated by the same United States District Judge who had granted it. I am informed and believe that such stay was vacated in part on the basis of an affidavit signed by me which substantially incorporated the facts set forth and papers annexed to this affidavit.

(25) The facts set forth in this affidavit as well as the timing of the action brought in the United States District Court clearly demonstrate that Overmyer's only purpose in bringing the New York action (which is based substantially on the same claims as the defenses set forth in Mr. Westmeyer's affidavit) was to delay the entry of a judgment herein which would enable Frick to enforce its just claims. In bringing these motions, Overmyer is clearly pursuing the same objective with the same insubstantial and unsupported allegations set up as defenses.

**E. Granting the Relief Asked for by
Overmyer on these Motions will
Gravely Prejudice Frick.**

(26) A stay of execution or an order for a new trial will greatly prejudice Frick since it will deprive Frick of the consideration which it received for twice extending the date when the amounts due to plaintiff from defendants became payable. Under the Contract payment of the contract price was to be completed 30 days after "completion of all work included and in approval and acceptance thereof by the owner and the general contractor . . .". Since such work was completed and accepted by the owner on March 17, 1967 (Exhibit 10 hereto) payment should have been made not later than April 16, 1967. However, as more fully set forth in paragraph 10 hereof, prior to such completion, the plaintiff had accommodated the owner by extending payment of \$174,627.90 of the purchase price through March 1, 1967. Thereafter Frick agreed to further extend the period for complete payment of its claims to a 21 months' period following March 1, 1967. This in effect reduced the monthly payments required of Overmyer from the \$15,498.23 required under the February arrangement to \$6,891.85. As consideration for such extension, Frick demanded the instant judgment note which entitled it to take judgment in the courts of Ohio if Overmyer's default under the note continued for 15 days. It is this security of which Frick would be deprived if the instant motions were granted.

(27) In this connection, I respectfully refer the Court to Exhibit 6 attached to this affidavit. Such Exhibit is the notice by Frick dated October 10, 1966 that it was discontinuing work on the installation because of the existing default in making the payments required by the Contract. In paragraph 2 thereof Frick agreed to continue the work on payment of " . . . \$35,000 in cash, provided the balance can be evidenced by interest bearing judgment notes."

(emphasis ours). Thus the ability to enforce its claim against Overmyer by immediate judgment in case of default was a condition precedent to the accommodations given Overmyer and Frick's willingness to go forward with completion of the installation without receiving the payments provided for under the Contract. Immediate resort to such security is even more imperative in Frick's view by reason of the financial irresponsibility of Overmyer shown by the history of its dealings with Frick and Frick's belief that Overmyer is now in financial difficulties resulting in nonpayment of obligations to other creditors.

(28) There is no allegation in any of the papers in support of these motions that Frick which has been in business since 1853 would be unable to respond to any judgment which Overmyer may obtain against it. Accordingly, denial of the motions can not prejudice Overmyer, particularly in view of the action which Overmyer chose to bring in the United States District Court in New York.

For the reasons above set forth, I respectfully submit that the motions made on behalf of the defendants herein should be denied.

/s/ HOWARD F. BURPEE
Howard F. Burpee

Sworn to before me this
29 day of July 1968.

MARY P. DILLON
Notary Public, State of New York

EXHIBIT 1

EXCERPT OF EXHIBIT I—CONSTRUCTION CONTRACT BETWEEN FRICK CO., AND NIXON CONSTRUCTION CO., D. H. OVERMYER CO., INC.

ARTICLE 1: WARRANTY

The Seller warrants, for a period of one year from date of completion machinery and equipment manufactured by the Seller to be free from defects in material and workmanship when the machinery and equipment has been operated in accordance with the Seller's recommendations. The Seller agrees to repair or replace, at the Seller's option, F.O.B. Waynesboro, Pa., any part manufactured by the Seller that in the judgment of the Seller was defective at the time of shipment provided the part is delivered by the Buyer to Frick Company at Waynesboro, Pa., transportation prepaid. The Seller warrants machinery and equipment furnished by the Seller but manufactured by others only to the extent that the Seller can enforce liability against the manufacturer thereof. The foregoing is in lieu of all warranties express or implied.

ARTICLE 2: SELLER'S LIMITATION OF LIABILITY

The Seller shall not be liable for any losses, damages, or delays caused by any defect, except to furnish duplicate parts in accordance with the above warranty. Buyer agrees that Seller shall not be liable for any damages to Buyer or to a third person arising out of the presence of the installed machinery and equipment on Buyer's premises or out of the use or operation thereof. In no event shall Seller be held liable to Buyer for consequential damages.

None of the warranties by the Seller contained herein shall be enforceable against the Seller if the Buyer shall default in making settlement of the purchase price hereunder or any of the payments required to be made by the Buyer to the Seller hereunder.

SPACE FOR INDUSTRY
D. H. OVERMYER CO., INC.

201 EAST 42ND STREET N. Y., N. Y. 10017 212 867-2170

January 16, 1967

To: Sub-Contractors and Suppliers of Green & White Construction Company, Inc. and Nixon Construction Co., Inc.

In past correspondence with you Green & White Construction Company, Inc. has advised you of our option to purchase the stock of their corporation and its subsidiary.

We are pleased to advise you at this time that we have decided to exercise our option to purchase the stock of Green & White Construction Company, Inc. (including its wholly-owned subsidiary, Nixon Construction Co., Inc.) In connection therewith, we will make a very substantial cash contribution to the capital of Green & White Construction Company, Inc.

Very shortly thereafter Green & White will be sending you its first check toward the payment of its account with you.

Under this plan, and with our assistance, Green & White will, in a reasonable period of time, be able to fully satisfy its obligations to you and it is our intention to see that this is accomplished as quickly as possible.

Very truly yours,

D. H. OVERMYER Co., Inc.

By: D. H. OVERMYER

D. H. Overmyer,

Chairman of the Board

EXHIBIT 2

Telegram, Sept. 30, 1966, Frick Company to
D. H. Overmyer Co.

WAYNESBORO

TELEGRAM

TELEGRAM

TELEGRAM

Waynesboro, Pennsylvania
September 30, 1966—4:30 p.m.

D. H. Overmyer Co.
New York, New York
201 E. 42nd Street

Att: D. H. Overmyer, President

As guarantor for payments on the contract between the Frick Company and the Nixon Construction Company, we call your attention to the following. Invoices for progress payments on labor and material thru Aug. 31, 1966, in the amounts of \$148,471 have been submitted. Payment of only \$28,969 has been received.

Frick Company has now substantially completed its contract. Absence of power wiring to the compressors as of 4:00 p.m. today prevents completion of the last step before operation which is charging of the system with refrigerant.

EXHIBIT 3

Letter, Oct. 3, 1966, Frick Company to
Nixon Construction Company.

October 3, 1966

Nixon Construction Company
201 East 42nd Street
New York, New York 10017

Re: Your Order 6306
Our Order 230046

Gentlemen:

Our invoice number 609-2310F dated September 30 is enclosed for \$74,529 which represents our final billing under the above referenced order.

We are enclosing our requisition No. 5 for the month of September in the amount of \$95,001.10. We will look forward to your making payment of this amount in accordance with the terms of the order.

Your remittance in the amount of \$104,654.90 we trust will reach us not later than this week so that we may proceed to complete final steps as mentioned in our Mr. Glen's telegram of September 29 to you.

Very truly yours,

• **FRICK COMPANY**
Credit & Collection Department

RRLesher:cm

cc: H. F. Burpee
M. A. Black, Jr.

SPECIAL DELIVERY

EXHIBIT 4

GREEN & WHITE CONSTRUCTION COMPANY

P. O BOX 1750

GRAND CENTRAL STATION

NEW YORK, N.Y. 10017

10/4/66

Gentlemen:

We are returning your invoice(s) numbered 609-231 OF. It is our policy to return invoices that have been submitted direct to New York. To avoid any unnecessary delay in payment, please submit the invoice(s) to the local branch office in accordance with our contract number 6306, dated 2/11/66. Vendors name Frick Company. The invoice(s) will then be approved locally and forwarded to New York for payment.

Sincerely,

HAROLD BARCLAY

Accounts Payable Department

EXHIBIT 5

October 7, 1966.

Nixon Construction Company
c/o Green and White Construction Company
302 South Byrne Road
Toledo, Ohio

Re: Your 6306
Our 230046

Gentlemen:

We mailed special delivery to Nixon Construction Company, 201 East 42nd Street, New York City our letter of October 3, 1966 enclosing our invoice number 609-231OF dated September 30, 1966 for \$74,529 together with our

requisition number five dated October 3, 1966 for \$95,001.10. Our letter with the aforementioned have been returned to us with a form letter of Green and White Construction Company dated October 4. They request that our invoice and requisition be sent "to the local branch office" as is "our policy". Accordingly we enclose these with this letter. In doing so we want to point out that your contract number 6306 does not specify such a procedure. Previous invoices submitted by us were sent to your New York City office and were not returned.

We also want to point out your contract paragraph six, item A, specifies amounts requested for payment shall be submitted not later than the 5th of the month and payable "thirty days after the date received in the New York City office". Our requisition number five requesting payment of \$95,001.10 was received by you in New York City before the 5th of October 1966. To substantiate this your form letter is dated October 4, 1966 and the postmark on the envelop returning these papers to us is October 5, 1966. Therefore, we will expect payment of the \$95,001.10 thirty days after October 5, or on November 5, 1966.

A copy of this letter is being sent to your New York City office.

Very truly yours,

FRICK COMPANY

Credit & Collection Department

RRLesher:cm

cc: M. A. Black, Jr.

Howard Burpee

Nixon Construction Co.—New York City

EXHIBIT 6

Letter, October 10, 1966, Frick Company to Green & White
Construction Company.

October 10, 1966

Green & White Construction Company
201 East 42nd Street
New York, N. Y. 10017

Attention: Mr. O. B. Spence
Vice President, Special Projects

Gentlemen:

Subject: Nixon Construction Co.
For Overmyer Warehouse, Toledo
Frick Order 230046

This letter will confirm our phone conversations of Friday, October 7, wherein I advised as follows:

1. Our management has directed us to discontinue work on this project unless arrangements can be made to straighten out the past-due payments covered under the contract.
2. In lieu of actual cash, Frick Company has indicated their willingness to accept your offer of \$35,000 in cash, provided the balance can be evidenced by interest-bearing judgment notes. This arrangement would have to be worked out with our Financial Department, but the management has agreed to this in principle.
3. Until such time as this situation has been resolved, the construction activity has been directed to not continue with the charging of the plant which we are ready to do at this time, and to discontinue all activities until the problem has been settled.

We hope that you will understand the necessity for doing this and that some method can be worked out promptly for a restart of the job.

Very truly yours,

FRICK COMPANY
W. F. SHRIVER
Chief Engineer

WFS:MRD

cc—HFBurpee, EWForth,
GFrank, TMGlen,
WAHans, JTSanders

EXHIBIT 7

Letter, Jan. 24, 1967, Frick Company to
The Overmyer Company, Inc.

January 24, 1967

Mr. Frank Lake, Treasurer
The Overmyer Company, Inc.
201 E. 42nd Street
New York, N. Y. 10017

Re: Frick Company—Nixon Construction Co.

Contract dated February 11, 1966
Frick Order 230046
Nixon Reference—Job 0427.71

Dear Mr. Lake:

Pursuant to the conversation between Mr. E. W. Forth, President of Frick Company, and Mr. Robinson, President of The Overmyer Co., Inc., I am forwarding herewith a Note to be executed by The Overmyer Company, Inc. It is my understanding that The Overmyer Co., Inc. agrees to pay Frick Company 10% of the present amount (\$194,031.00) due Frick Company, namely \$19,403.10, and the balance payable at 6½% interest per annum in 12 equal installments of \$15,498.23. Accordingly, the Note is drawn

only on the balance of \$174,627.90 plus interest of \$11,350.81 for a total of \$185,978.71, payable in 12 installments of \$15,498.23 each.

If the Note is in conformity with your understanding of the agreement reached between Messrs. Robinson and Forth, please have the attached Note executed by the President of The Overmyer Co., Inc., attested to by the Secretary and the corporate seal impressed thereon and return the executed Note to Frick Company, attention the writer, together with The Overmyer Co., Inc. check in the amount of \$19,403.10. Upon execution of the Note, kindly insert the date of such execution where indicated at the top of the Note. When Frick Company receives the properly executed Note and down payment check, we shall immediately undertake steps to place the refrigeration system in operative condition.

Very truly yours,

FRICK COMPANY
Arthur Frederick
Counsel

AF:HGC

EXHIBIT 8

Note, The Overmyer Company, Inc., to Frick Company

FOR VALUE RECEIVED, THE OVERMYER COMPANY, INC., a New York Corporation, (herein called "Maker"), with its principal office at 201 East 42nd Street, New York, N.Y., promises to pay to FRICK COMPANY, a Pennsylvania Corporation, (herein called "Payee"), at its office in Waynesboro, Pennsylvania, One Hundred and Seventy-Four Thousand Six Hundred and Twenty-Seven Dollars and Ninety Cents (\$174,627.90), with interest at six and one-half percent (6½%) per annum, said principal and interest to be paid in twelve (12) equal successive monthly installments of Fifteen Thousand Four Hundred and Ninety-Eight Dollars and Twenty-Three Cents (\$15,498.23), beginning March 1, 1967, and on the same day of each month until paid.

The Maker hereby waives presentment demand, notice and protest of this Note.

On the performance of any of the promises or agreements herein, or on the appointment of a receiver of the Maker or its properties, or the filing of a petition by or against the Maker under the Bankruptcy Act of the United States, or on the nonpayment of any of the indebtedness or liability aforesaid, the entire unpaid balance of the Note shall become due forthwith at the option of Payee, but without demand or notice; or on the insolvency, general assignment, or appointment of a receiver of the company, or its properties, the entire unpaid balance of this Note shall become due forthwith and ipso facto without demand or notice.

It is expressly understood and agreed that this Note shall not operate as or be construed to be a waiver of the mechanics lien heretofore filed by the Payee for work performed by Payee for Nixon Construction Company under a contract dated February 11, 1966; and shall continue in full force as though this Note had not been given. However, it is expressly understood and agreed that the payee will forego enforcement of their lien rights and any other legal remedies so long as there is no default under this Note.

IN WITNESS WHEREOF, the said Maker has caused this Note to be executed by its officers thereunto duly authorized and directed by a resolution of its Board of Directors duly passed and adopted by a majority of said Board at a meeting thereof duly called, noticed and held.

THE OVERMYER COMPANY, INC.

By: Frank J. Lake

Treas.

ATTEST:

E. M. Connery
Secretary
(Corporate Seal)

EXHIBIT 9.

Letter, Feb. 1967, Frank J. Lake to Frick Company.

THE OVERMYER COMPANY, INC.

New York, N. Y. 10017

February 16, 1967

Mr. Arthur Frederick
Counsel
Frick Company
Waynesboro, Pa.

Dear Mr. Frederick:

Enclosed is the Note which you sent us as amended per your conversation with Mr. Connery. Also enclosed is our check for the payment due at this time.

We will very much appreciate your beginning work immediately in that we have an acute time problem at the Toledo warehouse.

Sincerely,

Frank J. Lake

FJL:ram
Encls.

2-17-67

Hand carried this check & note to Bob Leshner this date.

[Initials]

EXHIBIT 10.**Notice of Completion and Acceptance, March 17, 1967.****FRICK COMPANY
NOTICE OF COMPLETION****3/17/67****Nixon Const. Co.—Overmyer Warehouse Co.
Toledo, Ohio****Gentleman:**

I have this day completed all work of supervision and erection and (demonstration) of the machinery and equipment specified in contract with you dated 2/11/66, and respectfully request acceptance of the said machinery and apparatus as per the contract conditions.

Yours truly,**Ira C. Coleman
Erector****Technical Services****3/17/67****Frick Company,
Waynesboro, Pa.****Gentleman:**

This is to inform you that your Erector, Mr. Ira C. Coleman has completed in a satisfactory manner all work of supervision and or erection and demonstration specified in contract with you dated 2/11/66, and that the said work as well as the machinery and apparatus specified in said contract, is hereby accepted as per the contract conditions.

Yours truly,**Marion Willis, V. P. Refrigeration
By William W. Byron, Gen. Mgr., Toledo**

EXHIBIT 11

THE OVERMYER COMPANY, INC.**201 East 42nd Street - New York, N. Y. 10017 - 212 867-2170****David V. Douthit****Administrative Assistant to the President****March 6, 1968**

**Arthur Frederick, Esq.
Frick Company
Waynesboro, Pennsylvania**

Dear Mr. Frederick:

As of this date the D. H. Overmyer Co., Inc. has incurred expenses in the amount of \$7,556.72 to repair the equipment that Frick Company installed in our Toledo cold storage warehouse.

Frick Company is the holder of a note issued by the D. H. Overmyer Co., Inc. in the original amount of \$130,977.

I wish to deduct this \$7,556.72 from the note payments.

If I do not hear from you by return mail prior to March 31, 1968, I will assume that you agree with me on the above and I will deduct it from the payments on the note.

Cordially,

**DAVID V. DOUTHIT
David V. Douthit**

cc

Registered Mail

EXHIBIT 12

FRICK COMPANY

Waynesboro, Pa. 17268

March 8, 1968

717. 762-2121

CABLE: FRICK

Mr. David V. Douthit,
Administrative Assistant to the President
The Overmyer Company, Inc.
201 East 42nd Street
New York, N. Y. 10017

Dear Mr. Douthit:

Reference is made to your letter of March 6, 1968, wherein you assert a claim against Frick Company in the amount of \$7,556.72 for alleged repair of equipment installed by Company at your Toledo cold storage warehouse.

First and foremost, the Frick Company will not agree to the deduction of this alleged \$7,556.72 from the payments due under the original note in the amount of \$130,977.00.

Since you have made no attempt to substantiate the claimed expenditures, it is difficult for us to determine the existence of Frick's liability. This amount probably includes expenditures incurred in rewinding motors, the liability for which was denied by Frick Company in a letter dated December 1, 1967 and sent to Mr. Daniel Fitzgerald. In addition, Frick Company has requested payment of \$5,725.94 for extras incurred by Frick in connection with the Toledo cold storage warehouse installation. A full discussion of this claim for extras was set forth by the writer in a letter to Mr. Robinson dated February 12, 1968.

In view of the foregoing, it is quite obvious that Frick Company cannot agree to your proposal. Any default in payment of the instalment note will result in appropriate legal action for collection.

Cordially,

Frick Company
~~ARTHUR FREDERICK~~
Arthur Frederick
Counsel

AF:HGC

CC R. W. Robinson, President
Certified Mail

Blind copies—P. F. ErkenBrack
R. R. Leshner
N. P. Whitney

*Refrigeration & Air Conditioning - Forest & Farm
Machinery*

EXHIBIT 12A

101 Park Avenue
New York, N. Y. 10017
Telephone MU 5-0511
June 13, 1966

D. H. Overmyer
Nixon Construction Co.
201 East 42nd Street
New York 10017, N. Y.
Subject: Refrigeration-Toledo
Frick #230046

Att: Mr. David E. Clarke

Gentlemen:

The Frick Company has again suggested that I call your attention to the fact that Toledo Edison is on record with a statement that they will furnish 480 volts.

The motor manufacturer has taken the position that the 440 volt motors will not be covered by a one year warranty if 480 volts are supplied.

This point is covered in Article 1—page 10 of the contract,

"The Seller warrants machinery and equipment manufactured by others only to the extent that the Seller can enforce liability against the manufacturer thereof."

Please accept my apology for being repetitious, but I assure you I will not mention the matter again.

Very truly yours,

FRICK COMPANY
HOWARD F. BURPER

HFB:bl

*Refrigeration & Air Conditioning-Forest & Farm
Machinery*

EXHIBIT 13.

Letter, June 23, 1967, D. H. Overmyer Co., Inc.,
to Frick Company.

D. H. OVERMYER CO., INC.

N. Y., N. Y. 10017

June 23, 1967

Arthur Frederick, Esq.
Counsel
Frick Company
Waynesboro, Pennsylvania 17269

Dear Mr. Frederick:

I have been informed that a settlement of your client's claim against our company has been negotiated between Mr. Forth, President of Frick Company and Mr. Robinson, President of D. H. Overmyer Co., Inc.

I am enclosing an Installment Note in the principal amount of \$130,970.94. This Note will be amortized over 21 months with the First Installment on June 1, 1967. It has been executed by our Ohio parent corporation, the Ohio state corporation, D. H. Overmyer and Shirley C. Overmyer.

We shall execute and record second mortgages on a Tampa and a Louisville site in order to secure this Note.

I have instructed our local attorneys in both cities to prepare second mortgage instruments and to order a title binder.

EXHIBIT 14.

Letter, Oct. 2, 1967, The Overmyer Company, Inc., to the Frick Company.

THE OVERMYER COMPANY, INC.

New York, N.Y. 10017

October 2, 1967

Arthur Frederick, Esq.
Frick Company
Waynesboro, Pennsylvania

Re: *Installment Note*

Dear Mr. Frederick:

In Mr. Cassidy's absence, I am forwarding to you the executed original of our Installment Note dated June 1, 1967, in the amount of \$130,977.00 together with five checks in satisfaction of the preliminary obligation thereunder to Frick Company as follows:

| <i>Date</i> | <i>Check No.</i> | <i>Amount</i> |
|-------------|------------------|---------------|
| 8/31/67 | 3103 | \$6,891.85 |
| 8/31/67 | 3104 | 6,891.85 |
| 8/31/67 | 3105 | 6,891.85 |
| 8/31/67 | 3106 | 6,891.85 |
| 10/1/67 | 3235 | 6,891.85 |

I am advising our local attorneys in Tampa and Louisville by copy of this letter to record the second mortgages previously agreed upon between you and Mr. Cassidy and which they now have in their possession.

I would ask that you have your corresponding attorney in Toledo to proceed to discharge the three Affidavits of Lien filed against our Toledo Cold Storage Facility.

I trust all the above is in accordance with the arrangements made between yourself and Mr. Cassidy on behalf

of this company. Please advise if there is anything further I can do.

Your very truly,

Edmund M. Connery
Secretary & General Counsel

EMC:ti

cc: Thomas W. Bullitt, Esq.

Edward Kohrs, Esq.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Affidavit of Paul C. Guth

(Filed: August 15, 1968)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PAUL C. GUTH, being duly sworn, deposes and says that:

(1) I am a member of the firm of Lauterstein & Lauterstein, 30 East 42nd Street, New York, New York, attorneys for the plaintiff Frick Company herein.

(2) At the request of Shumaker, Loop & Kendrick, attorneys for the plaintiff herein, I obtained a certified copy of the complaint of defendant D. H. Overmyer Co., Inc., an Ohio corporation in an action which was instituted by said Ohio corporation against our client Frick Company in the United States District Court for the Southern District of New York. Such action bears number 68 Civ. 2262 and is more fully described in paragraph (5) of my earlier affidavit verified July 29, 1968 heretofore filed or to be filed herein.

(3) I obtained such certified copy so sent to Ohio counsel by instructing the managing clerk of our office to pro-

ceed to the United States District Court for the Southern District of New York and obtain the appropriate certification on a copy of the complaint.

(4) Subsequently, the managing clerk of our office handed me such certified copy which was then forwarded by me to Ohio counsel.

(5) At the time I received such certified copy from the managing clerk, he advised me that the certification had been done by an official in the office of the Clerk of the Court after arrangements had been made to obtain the original complaint filed in the Court from the office of Judge Mansfield, a Judge of said Court where the entire file of said case is presently held in connection with his disposition of the motion more fully described in my earlier affidavit.

(6) Such certification is made in the name of John J. Olear as Clerk of the United States District Court for the Southern District of New York by one of his deputies.

(7) Said John J. Olear is listed as "Clerk of Court" in the section "United States District Court Southern District" in the official directory of the City of New York for the year 1967. I have also seen the name of John J. Olear listed as Clerk of the Court on various directories in the United States Court House, Foley Square, New York. Accordingly, I believe said John J. Olear to be the Clerk of the United States District Court for the Southern District of New York.

Paul C. Guth

Sworn to before me this 6th day of August, 1968.

Mary P. Dillon

Notary Public, State of New York

No. 44-6035100

Qualified in Rockland County

Certificate filed with N.Y. Co. Clerk

Commission Expires March 30, 1970

Exhibit to Paul C. Guth Affidavit

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF
NEW YORK

No. 68 Civ. 2262

Complaint

• • • • •

Plaintiffs, Nixon Construction Co., Inc., and D. H. Overmyer Co., Inc., by their attorney, complaining of the defendant, Frick Company, show this court and allege, on information and belief:

AS AND FOR A FIRST COUNT

1. Plaintiff, Nixon Construction Co., Inc., is a corporation, incorporated under the laws of the State of Florida, is licensed to conduct and transact business in the State of New York, and maintains its office and principal place for the transaction of its business in the County of New York, State of New York.

2. Plaintiff, D. H. Overmyer Co., Inc., is a corporation, incorporated under the laws of the State of Ohio, is licensed to conduct and transact business in the State of New York, and maintains its office and principal place for the transaction of its business in the County of New York, State of New York.

3. Defendant is a corporation, incorporated under the laws of the State of Pennsylvania and maintains its office and principal place for the transaction of its business in the State of Pennsylvania.

4. The amount in controversy in this cause exceeds the sum of ten thousand (\$10,000.) dollars, exclusive of interest and costs.

5. Plaintiff, D. H. Overmyer Co., Inc. was, at all times hereinafter mentioned, the owner of premises located at 3630 South Street, Toledo, Ohio, hereinafter designated as Toledo Site #3.

6. Plaintiff, Nixon Construction Co., Inc., was, at all times hereinafter mentioned, the General Contractor engaged by plaintiff, D. H. Overmyer Co., Inc., to construct a cold storage warehouse on plaintiff's premises designated in paragraph #5 hereof as Toledo Site #3.

7. On or about the 11th day of February, 1966, plaintiff, Nixon Construction Co., Inc., and defendant, entered into a contract No. 6306 at the principal office of plaintiff in the City of New York, State of New York, whereby defendant was engaged to perform certain work, labor, services and to furnish materials, equipment and machinery necessary for the construction of a complete automatic refrigeration system to be installed at the premises designated herein as Toledo Site #3. Copy of the aforesaid contract is annexed hereto, made a part hereof, and marked Exhibit A.

8. Plaintiffs have duly performed all the conditions of such contract on their part.

9. Defendant breached the aforesaid contract in that it performed its services in such an incompetent, negligent and unworkmanlike manner, and in that it supplied materials and machinery of such poor design and quality that plaintiffs were required and compelled to engage, and did in fact engage, other contractors to repair the defects existing therein, which defects existed solely because of the negligent work, design, and defective materials supplied, by defendant, as aforesaid.

10. By reason of the foregoing facts, plaintiffs have been damaged in the sum of Twenty-six Thousand Eight Hundred (\$26,800.00) Dollars.

AS AND FOR A SECOND COUNT

11. The allegations contained in paragraphs 1 through 9 inclusive are hereby repeated and realleged with the same force and effect as though here set forth in full.

12. The equipment and materials designed, fabricated and supplied by defendant, as aforesaid, were to have con-

stituted a completely autonomous and automatic refrigeration system.

13. Because of defendant's incompetent, negligent, and unsatisfactory design and workmanship, and because defendant designed, fabricated and/or supplied equipment & materials unsuitable and inadequate to meet the demands of the system; and because of defendant's general breach of the contract, as aforesaid, the system, as aforesaid, or integral and essential parts thereof, repeatedly broke down and became inoperative.

14. Due to the facts as aforementioned in paragraph 13 hereof, plaintiff was compelled and required to, and did in fact, hire, engage and employ additional qualified personnel to tend, maintain, and control the system at all times.

15. By reason of the foregoing facts, plaintiff has been damaged in the sum of Nine Thousand (\$9,000.00) Dollars.

AS AND FOR A THIRD COUNT

16. The allegations contained in paragraphs 1 through 9 and paragraphs 11 through 14 inclusive are hereby repeated and realleged with the same force and effect as though here set forth in full.

17. In and by the aforesaid agreement, a copy of which is annexed hereto, it was provided that the said refrigeration system was to be ready for demonstration and final acceptance on or about August 15, 1966, and the completion of the said work on or before that date was expressly made a condition of the said agreement and a part of the consideration for which defendant was paid the price set forth therein.

18. The defendant entered upon the performance of the work under the said agreement, and had wholly and totally failed and neglected to complete the said work in the time specified in the said contract for the completion thereof.

19. By reason of defendant's failure to complete the said work within the time specified in the said contract,

plaintiff was unable to have the same completed so as to go into possession thereof, and to have the same occupied as a public cold storage warehouse.

20. By reason of the foregoing facts, plaintiff has been damaged in the sum of Fifty Thousand, Five Hundred (\$50,500.00) Dollars.

AS AND FOR A FOURTH COUNT

21. The allegations contained in paragraphs 1 through 9, paragraphs 11 through 14, and paragraphs 16 through 19 inclusive are hereby repeated and realleged with the same force and effect as though here set forth in full.

22. Among other things, the defendant guaranteed and warranted that, for a period as set forth in said contract, the machinery and equipment manufactured by it and supplied by it would be free from defects in material and workmanship, and that the machinery specified therein would hold a temperature of minus 10 degrees F. to within the limits of standard temperature controls.

23. The said refrigeration system installed by defendant was not free from defects in material and workmanship and was totally inadequate for the purposes for which it was installed.

24. Within the period set forth in the contract annexed hereto, and upon ascertaining that the said equipment was defective and inadequate, plaintiff demanded of defendant that he make such repairs and changes in the refrigeration system as were required to comply with the provisions of the said agreement and warranty, and the said defendant wholly failed, neglected and refused to take such remedial steps, as required, and still so fails, neglects and refuses.

25. Upon the failure, neglect and refusal of the defendant to complete the aforesaid contract and warranty, plaintiff was compelled to, and did, cause the said refrigeration system to be put in a proper condition so that it would comply with the aforesaid contract and warranty.

26. Prior to ascertaining that the said refrigeration system did not comply with the provisions of the said contract and warranty, and while plaintiffs were ignorant of such facts, they paid to the defendant the sum of Two Hundred Twenty-three Thousand and Six (\$223,006.) Dollars, the total amount which they were required to pay to the defendant under the aforesaid contract, in the form of cash and installment note.

27. By reason of the foregoing facts, plaintiff has been damaged in the sum of Eighty-six Thousand, Three Hundred (\$86,300.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant:

(1) On the First Count in the sum of Twenty-six Thousand, Eight Hundred (\$26,800.00) Dollars, together with interest from the 1st day of March, 1967;

(2) On the Second Count in the sum of Nine Thousand (\$9,000.00) Dollars, together with interest from the 1st day of March, 1967;

(3) On the Third Count in the sum of Fifty Thousand, Five Hundred (\$50,500.00) Dollars, together with interest from the 1st day of March, 1967;

(4) On the Fourth Count in the sum of Eighty-six Thousand, Three Hundred (\$86,300.00) Dollars, together with interest from the 1st day of March, 1967;

(5) For costs and disbursements of this action.

JOHN P. GARRIGAN

John P. Garrigan

Attorney for Plaintiff .

Office and P.O. Address

201 East 42nd Street

Suite 400

New York, New York 10017.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 204697

Affidavit of Paul C. Guth

(Filed: August 15, 1968)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PAUL C. GUTH, being duly sworn, deposes and says that:

(1) I am a member of the firm of Lauterstein & Lauterstein, New York attorneys for the plaintiff Frick herein. By reason of the premises, I am familiar with the matters hereinafter set forth. This affidavit is submitted in opposition to a motion in this Court to stay the execution of a certain judgment obtained by plaintiff Frick Company (hereinafter "Frick") against one of the defendants herein and for a new trial in the instant action.

(2) I am informed and believe that this action was commenced on July 12, 1968 for judgment in the amount of \$62,370., together with appropriate interest and costs by reason of the default of defendant to pay the remaining balance on a note (hereinafter the "Note") in the original amount of \$130,977. Such note, among other things, authorized any attorney designated by Frick to appear in an Ohio Court, waive issuance and service of process and confess judgment in the event that the makers of such note made default in payment of any installment thereof required thereunder and such default remained uncured for a period of 15 days. On the basis of the pleadings herein, I am informed and believe judgment was rendered by this Court in favor of Frick and against defendants for the sum of \$62,370 with interest and costs on July 12, 1968. Such judgment was entered and docketed the same day.

(3) The instant motions are directed against the execution of such judgment and for a new trial.

(4) Such motions are supported by an affidavit by Joseph W. Westmeyer, Jr., Esq., verified July 22, 1968. In such affidavit Mr. Westmeyer concedes that the judgment herein was entered by virtue of a warrant of attorney; that the Note upon which such judgment was entered represented the contract price for the installation of a refrigeration system in a warehouse building in Toledo, Ohio owned by D. H. Overmyer Co., Inc. (hereinafter "Overmyer") one of the defendants herein; and alleges "that defendants will present evidence that plaintiff furnished and installed a refrigeration system of poor design and quality which did not meet the specifications of the contract and that the warranties given by plaintiff in connection with the contract for the installation of said equipment was breached;"

Mr. Westmeyer's affidavit does not contain any factual details or incorporate any correspondence or other papers to which this Court could refer in assessing the likelihood of Overmyer's success if a motion for a new trial was granted; nor does Mr. Westmeyer set forth any facts indicating financial irresponsibility on the part of Frick which would prevent the recovery of any amounts to which Overmyer might ultimately be adjudged to be entitled against Frick in this or any other action. It is also to be noted that Mr. Westmeyer does not express any belief that his client will ultimately succeed but merely swears that his client will "present evidence".

(5) The claims set forth in such barebone fashion in Mr. Westmeyer's affidavit are already the subject of an action which was brought among others by Overmyer as plaintiff against Frick in the United States District Court for the Southern District of New York. Such action bears number 68 Civ. 2262. Service of summons and complaint therein was made upon Frick on June 14, 1968. Such complaint contains three causes of action which are based on wrongdoings by Frick substantially characterized by the portions of Mr. Westmeyer's affidavit hereinabove set

forth with demands for damages aggregating \$132,100. My firm is acting as attorneys for Frick in the aforementioned action in the United States District Court for the Southern District of New York.

(6) After the commencement of such action in the United States District Court of New York (hereinafter the "New York action"), Overmyer brought a motion to enjoin Frick from enforcing the Note during the pendency of the New York action. Such motion was brought on by an order to show cause signed by the Hon. Marvin E. Frankel, a Judge of the United States District Court. The order to show cause contained a temporary stay of all proceedings by Frick to enforce the Note pending a decision of the motion for a temporary injunction.

The order to show cause was based on an affidavit by John P. Garrigan, Esq., sworn to June 19, 1968 which is attached hereto and made a part hereof as Exhibit A and a memorandum attached hereto and made a part hereof as Exhibit B.

(7) On the return date of the order to show cause June 24, 1968, Frick served a factual affidavit in opposition to the motion together with a brief setting forth the points on which it relied in such opposition. Overmyer answered the calendar call "Ready" without submitting any further papers in support of its motion. Subsequent to the calendar call the motion was adjourned first to July 2, 1968 and subsequently to July 16, July 23, 1968 and July 24, 1968 when Overmyer's motion was finally argued before the Hon. Walter E. Mansfield a United States District Court Judge. It is to be noted that Overmyer still submitted the case to Judge Mansfield on the basis of the papers which it had submitted in support of the order to show cause.

(8) Examination of Mr. Garrigan's affidavit (Exhibit A) will indicate that the only reference to the merit of Over-

myer's claim against Frick is contained in paragraph Sixth thereof, which states as follows:

"The Complaint of the Plaintiffs alleged in substance that the Defendant breached a contract by negligently performing work upon premises of the Plaintiffs and that as a result thereof the Plaintiffs have sustained those injuries and damages as alleged in the Complaint in the total sum of \$172,600."

(9) Examination of the complaint will indicate that it contains the most general allegations as to Frick's wrongdoings on which Overmyer's claims are based permitted by "notice pleading" under the Federal Rules of Civil Procedure. Even those allegations are made on "information and belief." Paragraphs Ninth and Tenth of the complaint with respect to the wrongs done by Frick and the damages sustained by Overmyer fairly represent the substance of all the allegations as to wrongdoings and damages contained in the other causes of action. Such paragraphs read as follows:

"9. Defendant breached the aforesaid contract in that it performed its services in such an incompetent negligent and unworkmanlike manner, and in that it supplied materials and machinery of such poor design and quality that the plaintiffs were required and compelled to engage, and did in fact engage, other contractors to repair the defects existing therein, which defects existed solely because of the negligent work, design, and defective materials supplied, by defendant, as aforesaid."

"10. By reason of the foregoing facts, plaintiffs have been damaged in the sum of Twenty-six Thousand Eight Hundred (\$26,800.00) Dollars."

(10) Immediately after the adjournment of the motion for a temporary injunction on July 2, 1968, I made application to Judge Frankel for a vacatur of his stay pending the decision of the motion for a temporary injunction.

Judge Frankel heard Frick's application in Chambers on July 5, 1968 in the presence of Mr. Garrigan, Overmyer's counsel. At the outset of the hearing Judge Frankel stated that the file before him was obviously incomplete since he did not see any of Overmyer's papers on which it based its motion for a temporary injunction.

Mr. Garrigan then referred to Exhibits A and B which Judge Frankel held in his hand at the time.

Judge Frankel expressed some astonishment that Mr. Garrigan was willing to rely on such papers in a motion for a temporary injunction. Judge Frankel then stated that the Overmyer papers did not contain any factual basis on which relief could be granted and that the Frick papers showed Overmyers claims to be without merit. The Judge then vacated the stay. The Frick papers referred to by Judge Frankel substantially embodied the materials incorporated in the affidavit of Howard F. Burpee submitted simultaneously herewith.

In further discussion with Mr. Garrigan, Judge Frankel also stated that he felt that in view of the fact that he had initiated this motion by his order to show cause and had carefully studied all the documents, it would be in the interest of economy of time for him to deny the motion for a temporary injunction since it would obviously fail.

Mr. Garrigan objected to such denial on the ground that another judge of the United States District Court who was presiding over the motion term on July 16 (the date to which the motion had been adjourned) had jurisdiction over the motion and that Judge Frankel had no such jurisdiction.

Judge Frankel did not press this point. However, he did observe that the motion would be moot in any event by the time it was heard since Frick would have entered its judgment in Ohio by then. Judge Frankel then struck the provisions for the temporary stay from the original order to show cause and also signed an order vacating it, a copy of which is annexed to this affidavit as Exhibit C.

(11) I have prepared or read all the papers submitted by our firm on behalf of Frick in this matter, and I can state unequivocally that all of our affidavits and briefs have stressed and emphasized the absence of any factual support for Overmyer's claim and it is to be contradicted by the papers annexed to the Burpee affidavit filed herein.

(12) Overmyer was served with our first papers on June 24, 1968 and the last such paper was served on Overmyer on July 3, 1968.

(13) Despite the above contentions of Frick so often reiterated in their de facto judicial endorsement by Judge Frankel, Overmyer chose to submit its case before Judge Mansfield on July 24 on the same unsupported and general allegations of Frick's wrongdoings. I submit that this tenacity can only be the result of necessity, i.e., the inability of Overmyer's learned and skillful attorneys to dredge up from Overmyer's file any evidence of wrongdoings by Frick which would enable them to make their claim more specific.

(14) The facts and documents set forth or incorporated in the Burpee affidavit as well as the history of the motion of the New York action recited above clearly demonstrate that the instant motions are only a last ditch attempt by Overmyer to avoid the payment of its lawful debts.

/s/ PAUL C. GUTH
Paul C. Guth

Sworn to before me this
29 day of July, 1968.

MARY P. DILLON

No. 44-635120

Notary Public, State of New York

Qualified in Rockland County

Certificate filed with N. Y. Co. Clerk

Commission Expires March 30, 1970

Exhibit to Affidavit of Paul C. Guth

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 68 Civ. 2262

Affidavit of John P. Garrigan

• • • • •
STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN P. GARRIGAN, being duly sworn deposes and says:

THAT he is the Attorney for the Plaintiffs in the above entitled action and is fully familiar with all the facts and circumstances herein.

1. This Affidavit is submitted in support of an application by the Plaintiffs for an order staying all proceedings on the part of the Defendant pursuant to an Installment Note, Indenture and Second Mortgage, each of which is dated June 1, 1967. Copies of the Note, Indenture and Second Mortgage are annexed hereto and made a part of this application.

2. The instruments in question were executed to secure an indebtedness of D. H. Overmyer Co., Inc., to the Defendant, Frick Company, in the sum of \$130,977. The mortgaged property was and is located in Jefferson County, Kentucky, and the deed thereto is duly recorded in the Office of the Clerk of the County Court, Jefferson County, Kentucky, in Book 4006, Page 573.

3. The mortgage provides in part as follows:

"In the event Borrower shall (a) fail to pay the Note and/or interest when the same shall become due and payable; or (b) sell or permit the MORTGAGED PROPERTY to be sold without the assent of LENDERS; or (c) be adjudged a bankrupt or insolvent, make an assignment for the benefit of its creditors or be placed in receivership; or (d) in any manner fail to keep and perform any of the covenants, stipulations, and agreements set

out in the Note or herein contained on its part to be performed, then, and in any of such events, Frick Company may, without notice, at its option immediately declare the entire unpaid balance of the Note and any other indebtedness secured hereby immediately due and payable and proceed to enforce the collection of the same and all charges and costs permitted by law and the lien of this Mortgage."

4. The Installment Note provides in part as follows:

"The undersigned hereby waive presentment, demand, notice and protest of this note".

"The entire unpaid balance of this Note shall become due and payable at the option of the Payee, without demand or notice, on the appointment of a receiver of the undersigned or of its properties, if such receivership is not discharged within fifteen (15) days; or on the filing of a petition by or against the undersigned, under the Bankruptcy Act of the United States, if such petition is not discharged within fifteen (15) days; or on the default in the payment of any installment of principal or interest, if said default continues for fifteen (15) days; or on the general assignment for the benefit of creditors, if said assignment is not discharged within fifteen (15) days".

5. By Summons and Complaint dated May 29, 1968, and duly filed in the Office of the Clerk of the United States District Court for the Southern District of New York the Plaintiffs commenced an action to recover for breach of contract by the Defendant.

6. The Complaint of the Plaintiffs alleged in substance that the Defendant breached a contract by negligently performing work upon premises of the Plaintiffs and that as a result thereof the Plaintiffs have sustained those injuries and damages as alleged in the Complaint in the total sum of \$172,600. Service was effected upon the Defendant but to date no answer has been interposed.

7. Due to the outstanding obligation by the Defendant to the Plaintiffs said Plaintiff, D. H. Overmyer Co., Inc., has stopped payment to the Defendant of those obligations under the Installment Note, Indenture and Second Mortgage referred to above. Payment has been stopped as of June 1, 1968.

8. Plaintiff is moving for Order to Show Cause instead of normal motion because it is readily apparent that the Plaintiff D. H. Overmyer Co., Inc., would be severely damaged if the Defendant were to accelerate the Note and foreclose upon the premises covered by said mortgage.

9. In view of the foregoing, it is respectfully submitted that the interest of justice will best be served by the granting of the relief sought herein and staying all proceedings on the part of the Defendant until a determination of the action presently pending in this Court.

10. No previous application for the same or similar relief has been made to any other Court or Judge.

WHEREFORE, this deponent respectfully prays that an order be made herein staying all proceedings on the part of the Defendant pursuant to the Installment Note, Indenture and Second Mortgage until a determination of the litigation now pending in this Court together with such other further relief as to this Court may seem just and proper.

/s/ JOHN P. GARRIGAN
John P. Garrigan

Sworn to before me this
19th day of June, 1968.

/s/ GERALD N. GOLDBERG
Gerald N. Goldberg

Notary Public, State of New York

No. 31-6538920

Qualified in New York County

Commission Expires March 30, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 68 Civ. 2262

Memorandum of Plaintiffs, Nixon Construction Co., Inc., and
D. H. Overmyer Co., Inc.

FACTS

The Plaintiffs herein are seeking an Order to Show Cause staying any and all proceedings on the part of Defendant FRICK COMPANY until a determination of the action which was commenced in this Court by the filing of a Summons and Complaint on May 29, 1968.

POINT I

A STAY OF PROCEEDINGS IS WARRANTED
IN THIS ACTION

It is necessary for the Plaintiffs to seek extraordinary relief by way of an Order to Show Cause to prevent the acceleration of an obligation executed on June 1, 1967.

On said date an Installment Note in the sum of \$130,970. was executed by D. H. OVERMYER Co., Inc., and secured by a Second Mortgage on certain property of said Plaintiff D. H. OVERMYER Co., Inc.

The action which has been commenced in the U. S. District Court for the Southern District of New York sounds in breach of contract and the Plaintiffs are seeking to recover of the Defendant the sum of \$172,600.

The Plaintiff, D. H. OVERMYER Co., Inc. has stopped payment to Defendant, FRICK COMPANY, pursuant to the Installment Note referred to above in view of the pending litigation in this Court and the substantial nature of the damages sought. Payment has been stopped as of June 1, 1968.

As is indicated in the Affidavit of John P. Garrigan, the Plaintiff, D. H. OVERMYER Co., INC. has stopped payment because of the present litigation and the breach by Defendant, FRICK COMPANY, of its contractual obligations with the Plaintiffs.

In view of the fact that the Plaintiff, D. H. OVERMYER Co., INC. would be severely and substantially damaged if FRICK COMPANY were to accelerate the Installment Note referred to herein this application for a stay of proceedings is being made.

POINT II

THE RELIEF SOUGHT SHOULD BE GRANTED.

Respectfully submitted,

/s/ JOHN P. GARRIGAN
John P. Garrigan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 68 Civ. 2262

Order Vacating Stay

Upon the annexed affidavit and application of Paul C. Guth, verified the 3rd day of July 1968, the Order to Show Cause herein issued on June 19, 1968 and the annexed affidavit and motion of John P. Garrigan in support thereof verified the 19th day of June 1968, the affidavit of Howard F. Burpee verified the 24th day of June 1968, the summons and complaint dated May 29, 1968, the Installment Note dated June 1, 1967, the Indenture dated June 1, 1967, and

the Second Mortgage dated June 1, 1967, and upon all the pleadings and proceedings heretofore had herein, it is

ORDERED, that the third paragraph of said Order to Show Cause herein dated June 19, 1968 is hereby rescinded and revoked and the stay therein ordered of the proceedings more fully described therein on the part of said defendant or its attorney until a hearing and determination of this motion be and hereby is vacated; and

LET service of a copy of this order upon John P. Garigan, Esq., attorney for plaintiffs herein be good and sufficient notice of entry thereof.

/s/ MARVIN E. FRANKEL

United States District Judge

Dated: July 5, 1968
New York, New York

**Index From Defendants' (Overmyer) Memorandum in
Support of Motion To Vacate**

Filed in the Common Pleas Court of Lucas County, Ohio

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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

C.P. No. 204697

Journal Entry
(Excerpt)

.....

This day this cause came on to be heard and was heard on the oral motion of both the plaintiff and defendants for the court to order nunc pro tunc the Clerk of Courts to stamp as filed the 5th day of September, 1968 * * * a certified copy of an opinion by United States District Judge Walter Mansfield [in the case *Nixon Construction Company, Inc. and D. H. Overmyer Co., Inc. v. Frick Co.*, File No. 68 Civ. 2262 in the United States District Court, Southern District of New York] * * * all of which were submitted to the Court on that date, considered by the Court in reaching its judgment herein, placed by the Court in the file, but not previously stamped as filed.

The Court, being fully advised in the premises, finds that said motion is well taken.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Clerk of Courts be, and he hereby is, ordered nunc pro tunc to stamp the original affidavits, which are in the Court's file and referred to above, as filed the 5th day of September, 1968.

/s/ JOHN J. CONNORS, JR.
Judge

Approved:

/s/ SHUMAKER, LOOP & KENDRICK
Shumaker, Loop & Kendrick
Attorneys for Plaintiff

/s/ BUGBEE & CONKLE
Bugbee & Conkle
Attorneys for Defendants

**Certified Copy of an Opinion by United States District Judge
Walter Mansfield in the Case of Nixon Construction Co.,
Inc. and D. H. Overmyer Co., Inc. v. Frick Company**

No. 68 Civ. 2262

**In the United States District Court
Southern District of New York**

(Filed: August 7, 1968)

**And Attached to Journal Entry in the
Common Pleas Court of Lucas County, Ohio**

C. P. No. 204697

(Filed: March 3, 1969)

APPEARANCES

**JOHN P. GARRIGAN, Esq.
Attorney for Plaintiffs
201 East 42nd Street
New York, N. Y. 10017**

**LAUTERSTEIN & LAUTERSTEIN
Attorneys for Defendant
30 East 42nd Street
New York, N. Y. 10017**

MANSFIELD, D. J.

In this diversity suit for damages which was commenced in June 1968 by two affiliated construction companies ("Nixon" and "Overmyer") against a company engaged in the manufacture and installation of refrigeration equipment ("Frick"), plaintiffs seek an order staying defendant from prosecuting state court proceedings elsewhere to foreclose mortgages given to secure payment of certain installment notes, now admittedly past due, until determination of the present action. For the reasons hereinafter stated the motion is denied. The pertinent facts as re-

vealed in the papers and upon argument of the motion are as follows:

Under a contract dated February 11, 1966 between Nixon and defendant, which was guaranteed by Overmyer, defendant agreed to install refrigeration equipment in certain warehouse facilities in Toledo, Ohio, being constructed by Nixon for Overmyer, its affiliate. As the work progressed defendant encountered delays caused by Nixon. Nixon also failed to make progress payments required under the terms of the contract. As a result, in November 1966, after Nixon's arrears amounted to well over \$100,000, defendant filed mechanics liens on the warehouse property under construction in the sum of \$194,031. Thereupon Overmyer, in order to induce the defendant to continue with the installation, paid defendant 10% of the amount owed and executed a promissory note agreeing to pay the balance of the amount due in 12 equal installments of \$15,498 each, on condition that in the event of default the balance of the unpaid installments would be accelerated and become due immediately. On March 17, 1967, defendant completed the installation of the refrigeration equipment specified in the contract, which was acknowledged in writing by Overmyer's vice-president to have been "completed in a satisfactory manner". Under the terms of the February 11, 1966 contract, acceptance of the installed machinery and equipment constituted a waiver by the buyer of all claims except warranties. Defendant asserts that the work was performed properly and in accordance with the terms of the contract and that any delays in construction were due to Nixon's failure to meet its obligations and the failure of other contractors hired by Nixon to complete work which had the effect of preventing defendant from proceeding more rapidly.

Following defendant's completion of the installation and acceptance of it by the owner, Overmyer obtained from defendant an extension of time within which to pay off its

indebtedness to defendant. A new installment note was executed by Overmyer in the sum of \$130,977 dated June 1, 1967, requiring payment in 21 monthly installments, which would be accelerated in the event of default. This note was secured by execution of second mortgages on real estate in Hillaboro County, Florida, and Jefferson County, Kentucky, whereupon on November 3, 1967, defendant released its mechanics liens. Plaintiff Overmyer has defaulted in payment of installments under its note, leading defendant to undertake institution of foreclosure proceedings. Thereupon plaintiffs commenced the present action which seeks damages in the sum of more than \$170,000, based upon defendant's alleged breach of its aforementioned contract. The principal claims are that the defendant performed its services in an incompetent, negligent and unworkmanlike manner. No equitable relief is demanded.

Defendant asserts that the instant action and application for a stay is baseless and has been instituted for the purpose of preventing defendant from enforcing the security to which it is entitled under its 1967 agreement with Overmyer.

CONCLUSIONS

Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary the extensive documentary evidence furnished by defendant indicates that the plaintiffs' action lacks merit.

No basis for equitable relief in the form of a stay or injunction is indicated. Plaintiffs' suit is limited to an action of damages and there is no showing that it would suffer any irreparable injury as a result of defendant's enforcement of the security.

The effect of granting relief would be to prevent the institution of court proceedings in Florida and Kentucky in violation of the policy enunciated in Title 28 U.S.C. § 2283.

Accordingly, plaintiffs' motion for injunctive relief in the form of a stay is denied. The foregoing shall constitute the Court's findings of fact and conclusions of law in accordance with Rule 52(a), F.R.C.P.

So ORDERED.

s/ WALTER R. MANSFIELD
U.S.D.J.

Dated: August 7, 1968.

IN THE
COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

C.P. No. 204697 -

Motion for Reconsideration

• • • • •
Now come the appellants herein and move the court to reconsider its findings that defendants-appellants failed to prove the existence of a valid defense and that the answer and cross petition of defendants-appellants constituted only a counterclaim, and to reconsider its failure to rule upon the issue of the proper rate of interest to be charged on the judgment as requested by defendants-appellants.

Respectfully submitted,

/s/ BUGBEE & CONKLE
Bugbee & Conkle
Attorneys for Defendants-
Appellants

IN THE
COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

C.P. No. 204697

Motion To Certify the Case to the Supreme Court

Now come the appellants herein and move the court to certify the decision herein to the Supreme Court of Ohio because of its conflict with *Rabb v. Kayline Co.*, 4 Oh. L.A. 703 (C.A., Cuyahoga, 1926); *Canton Implement Co. v. Rauh*, 37 Oh. App. 544 (Stark, 1930); *Duraclean Co. v. Hunter*, 4 Oh. App. 2d 123, 33 Oh. Op. 2d 187 (Medina, 1965) and *McMillen v. Willard Garage*, 14 Oh. App. 2d 112 (Hancock, 1968).

Respectfully submitted,

/s/ BUGBEE & CONKLE
Bugbee & Conkle
*Attorneys for Defendants-
Appellants*

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

C.P. No. 204697

Application for Conclusions of Fact

Now come the appellants herein and apply to the court to state on the record the conclusions of fact found separately from the conclusions of law in this appeal.

Respectfully submitted,

/s/ BUGBEE & CONKLE
Bugbee & Conkle
*Attorneys for Defendants-
Appellants*

IN THE COURT OF APPEALS OF LUCAS COUNTY, OHIO

C.A. No. 6552

Journal Entry

• • • • •

This cause came on to be heard on the Application of defendants-appellants for conclusions of fact found separately from conclusions of law; Motion of defendants-appellants for reconsideration; and Motion of defendants-appellants to certify the record of the Court of Appeals to the Ohio Supreme Court as a conflict case; and the same was submitted to this Court on the Briefs of counsel.

The Court, being fully advised in the premises, finds that the Application of defendants-appellants for conclusions of fact found separately from conclusions of law should be denied.

The Court further finds that the Motion of defendants-appellants for reconsideration should be overruled.

The Court further finds that the judgment of this Court is not in conflict with any decision of the Court of Appeals of any other district, accordingly the Motion of defendants-appellants to certify the record of the Court of Appeals in this case to the Ohio Supreme Court should be overruled.

It is therefore ORDERED, ADJUDGED and DECREED that the Application of defendants-appellants for conclusions of fact found separately from conclusions of law is denied.

It is further ORDERED, ADJUDGED and DECREED that the Motion of defendants-appellants for reconsideration is overruled.

It is further ORDERED, ADJUDGED, and DECREED that the Motion of defendants-appellants to certify the record of

the Court of Appeals in this case to the Ohio Supreme Court is overruled.

To all of which defendants-appellants except.

/s/ CLIFFORD F. BROWN

*Judge of the Court of Appeals
Presiding*

Approved:

BUGBEE & CONKLE

/s/ BUGBEE & CONKLE

Attorneys for Defendants- Appellants

SHUMAKER, LOOP & KENDRICK

/s/ JAMES M. TUSCHMAN

Attorneys for Plaintiff-Appellee

THE SUPREME COURT OF THE STATE OF OHIO

1969 Term

To wit: December 17, 1969

No. 69-720

Mandate

*To the Honorable Common Pleas Court Within and for
the County of Lucas, Ohio, Ohio, Greeting:*

*The Supreme Court of Ohio commands you to proceed
without delay to carry the following judgment in this cause
into execution:*

Appeal dismissed, sua sponte, no substantial constitutional question involved.

7 THOMAS L. STARTZMAN,
Clerk

69-5

APR 16 1970

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, ~~1970~~

No. ~~1970~~

D. H. OVERMYER Co., INC., of Ohio,
and

D. H. OVERMYER Co., INC., of Kentucky, *Petitioners*

v.

FRICK COMPANY, a Pennsylvania Corporation,
Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF LUCAS COUNTY, OHIO**

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